

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1550

74-1550

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-1550

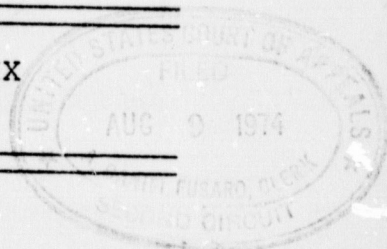
THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
CARMINE TRAMUNTI, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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DEFENDANTS-APPELLANTS' JOINT APPENDIX
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HERBERT SIEGAL
Attorney for Defendant-Appellant
Carmine Tramunti
17 John Street
New York, New York 10038
RE 2-5330

NANCY ROSNER
Attorney for Defendant-Appellant
Louis Inglese
401 Broadway
New York, New York 10013
925-8844



(23)

PAGINATION AS IN ORIGINAL COPY

IVAN S. FISHER
Attorney for Defendant-Appellant
Donato Christiano
401 Broadway
New York, New York 10013
925-5937

ROBERT L. ELLIS
Attorney for Defendant-Appellant
Angelo Mamone
17 East 63rd Street
New York, New York 10021
838-2323

FRANK A. LOPEZ
Attorney for Defendant-Appellant
Joseph DiNapoli
31 Smith Street
Brooklyn, New York 11201
237-9500

THEODORE ROSENBERG
Attorney for Defendant-Appellant
Frank Pugliese
31 Smith Street
Brooklyn, New York 11201
858-0589

KENNETH E. WARNER
Attorney for Defendant-Appellant
Joseph Ceriale
875 Avenue of the Americas
New York, New York 10001
244-4444

ROBERT FISKE
Attorney for Defendant-Appellant
John Gamba
One Chase Manhattan Plaza
New York, New York 10005
422-3400

GEORGE DAVID ROSENBAUM
Attorney for Defendant-Appellant
Vincent D'Amico
51 Chambers Street
New York, New York 10007
BE 3-8120

MICHAEL C. DOWD
Attorney for Defendant-Appellant
Frank Russo
120-10 Queens Boulevard
Kew Gardens, New York 11415
793-2900

ROBERT LEIGHTON
Attorney for Defendant-Appellant
Warren C. Robinson
15 Park Row
New York, New York 10038
267-6016

GARY SUNDEN
Attorney for Defendant-Appellant
William Alonzo
401 Broadway
New York, New York 10013
925-4848

EDWARD PANZER
Attorney for Defendant-Appellant
Hattie Ware
299 Broadway
New York, New York 10007
349-6128

MARTIN JAY SIEGAL
Attorney for Defendant-Appellant
John Springer
250 West 57th Street
New York, New York 10019
586-1414

HARRY POLLAK
Attorney for Defendant-Appellant
Henry Salley
299 Broadway
New York, New York 10007
BE 3-0386

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2 UNITED STATES OF AMERICA
3 vs.
4 CARMINE TRAMUNTI, et al.

73 Cr. 1099

5 New York, March 1, 1974;
6 10.00 A.M.

7 Trial resumed.

8 (In open court; jury not present.)

9 THE COURT: Mr. Curley, are you covering for
10 Mr. Dowd?

11 MR. CURLEY: Yes, your Honor.

12 THE COURT: Mr. Panzer, will you cover for Martin
13 Jay Siegel?

14 MR. PANZER: I will, your Honor.

15 THE COURT: Mr. Leighton, would you cover for Mr.
16 Harry Pollak?

17 MR. LEIGHTON: Yes.

18 THE COURT: We ended up yesterday with Mr. Lopez
19 telling me that he had been served with a subpoena to
20 appear today. I assume he is here because I can see him.

21 Mr. Lopez, you want to say anything about that?

22 MR. LOPEZ: I think Mrs. Rosner and Mr. Fisher
23 will make some statements and I think other attorneys will.
24 I will say nothing at this time.

25 THE COURT: You feel like you are a sequestered
witness.

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2 THE WITNESS: Yes, your Honor.

3 MR. FISHER: If your Honor please, on the
4 application to quash the subpoena, the agency theory
5 proffered by the government is very facile but lacks
6 sufficient merit.

7 The fact is, your Honor, the government here
8 attempts to bootstrap itself to an agency construction.
9 There is no proof of an agency relationship between the
10 defendant Di Napoli and his attorney, Mr. Lopez, such as
11 would include making of public statements such as the kind
12 that were alleged to have been made by the government.

13 Absent that showing the only other thing the
14 government relies upon is a statement by the alleged agent,
15 Mr. Lopez, that he is the agent of Di Napoli. Even in the
16 case cited by the government there is a sentence in there
17 which clearly indicates that an agent cannot by his own
18 declaration establish an agency relationship with the
19 principal.

20 There is then no way the government is in a
21 position to establish the agency principle and therefore
22 no way in the world that it can attribute the statements
23 allegedly made by Mr. Lopez to the defendant Di Napoli.

24 Further, if your Honor please, with regard to
25 the offer of -- do you remember the name?

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2 MR. LOPEZ: Mr. Borden.

3 MR. FISHER: Mr. Borden, if your Honor please,
4 I am advised had a conversation with Mr. Lopez prior to
5 the making of that statement in which he assured Mr.
6 Lopez that whatever conversation was had was strictly for
7 the purposes of Internal Affairs investigation and would,
8 in any event, never be used for any purpose against his
9 clients, and that is the only reason that statement was
10 made to Mr. Borden.

11 Beyond all of this, your Honor, we have a very,
12 very serious Sixth Amendment problem. At this point in
13 time the government takes advantage of a very unfortunate
14 situation. One, it should have advised the defendant Di
15 Napoli about it weeks ago. It is clear from the motions
16 and arguments had before this trial commenced, your Honor,
17 that the government was going to attempt to offer the
18 million dollars, that the defense to the million dollars,
19 should the Court receive the millions dollars, was that
20 Mr. Di Napoli was a loan shark and the money was the
21 profits of loan sharking, not the criminal activity charged
22 in this case. Then, your Honor, the government must
23 surely have been aware of the statement that it now seeks
24 to attribute to Di Napoli.

25 Under those circumstances it should have advised

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2 Mr. Di Napoli that his attorney's credibility would be a
3 question of great importance with regard to his defense,
4 it should have advised him, as it does so often, that
5 there was a potential conflict, and he should have had an
6 opportunity to get another lawyer before this case began.
7 Now if this goes in Mr. Di Napoli is being represented by
8 someone who the government claims in substance to be a
9 liar.

10 Further, if your Honor please, as a lawyer in
11 this case, I think it inures to the prejudice of the other
12 defendants in this case as well to have a situation where
13 the lead counsel, if your Honor please, is cast under an
14 umbrella of suspicion as a result of the offer the govern-
15 ment seeks to introduce here.

16 For all of these reasons the defendant Di Napoli
17 moves to quash and the other defendants, if your Honor
18 please, join that motion, and in the event that the Court
19 denies the motion to quash I on behalf of Christiano, and
20 I am advised other counsel will join me, move for a
21 severance, your Honor.
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2 MRS. ROSNER: I would only underscore
3 one thing said by Mr. Fisher. As I understand the
4 government's offer of proof at this time, the only proof
5 of Mr. Lopez' agency to make this statement on behalf
6 of Mr. DiNapoli is the statement of Mr. Lopez himself
7 that he was authorized to make the statement, and it is
8 clear from both Marchisio and Miller, which were cited
9 by the government, that this agency like any other known
10 in criminal law is one which must be proved by nonhearsay
11 evidence.

12 If there is something in the way of nonhearsay
13 evidence which the government has to offer in support of
14 its agency theory I think it should be told at this
15 time, and if such proof fails, your Honor, if there is
16 none, I think it is absolutely clear that Mr. Lopez'
17 own declarations are insufficient to establish agency,
18 and the government has the burden on that issue, your
19 Honor, not the defendant.

20 THE COURT: Yes, Mr. Ellis.

21 MR. ELLIS: I agree, of course, with what
22 Mrs. Rosner and Mr. Fisher said about the right of
23 the government to attempt to establish the agency through
24 declarations of the agent. I learned in my second day
25 of law school that you can't do that, that you have to

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2 prove the agency through declarations of the principal.

3 But beyond that, what I understand the
4 government is trying to do here is to impute a statement
5 of Lopez that they say is inconsistent with the proof of
6 the source of the money to DiNapoli as though it were
7 DiNapoli's statement. There are a lot of things
8 wrong with that, Judge, besides the absence of proof of
9 agency.

10 One of the things that is wrong with it is that
11 Lopez also represented another man, Vincent Papa.
12 There is no evidence in the record that he didn't conduct
13 his own investigation as to where that money came from.

14 I am very, very concerned, your Honor, about
15 the pragmatic impact of putting a lawyer on the stand on
16 the eve of summation and putting his credibility in
17 jeopardy. I would also like to point out that putting
18 Lopez on the stand before the jury gives him the Hobson's
19 choice, giving evidence inconsistent with the position
20 of his client on this trial, possibly incriminating himself
21 with respect to a matter that has been the subject of every
22 criminal investigation or many criminal investigations
23 that I have read about over the last year, and would thus
24 tend to have a chilling effect either upon his own Fifth
25 Amendment rights or upon his representation of his client,

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2 and I don't want to go up there and summarize, Judge,
3 after a lawyer's credibility has been impeached, or I
4 don't want to be in the position of having to impeach
5 Lopez' credibility in this case. I can't see how that
6 doesn't prejudice me.

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7 THE COURT: All right.

8 MR. PANZER: Your Honor, I submit an additional
9 argument which has just occurred to me.

10 If Mr. Lopez is going to be a witness on the
11 stand, Mr. DiNapoli will lose some of his constitutional
12 rights. Certainly Mr. Lopez is not going to cross examine
13 Mr. Lopez and I think that is a serious problem.

14 THE COURT: I think he might try.

15 All right, Mr. Phillips, do you want to be
16 heard on this, or Mr. Curran?

17 MR. CURRAN: Your Honor, may I briefly?

18 Before talking about what has been referred
19 to as the agency problem I would like to come perhaps more
20 directly to the point.

21 Putting aside any question of agency, I don't
22 think that is really the precise issue, although there
23 may be some secondary arguments on that, what the govern-
24 ment proposes to do in this case is really quite simple,
25 is to call Mr. Lopez and to have him testify to communica-

tions made to him, statements made to him by the defendant DiNapoli.

Ordinarily, as your Honor well knows and everyone would immediately say that is a horrible violation of the attorney-client privilege, one can't do that, and ordinarily, your Honor, one could not do that. However, your Honor, in this case, and as your Honor knows, it is a fundamental principle that once a communication has been disclosed to a third party, any third party, then it is no longer a privileged communication and it can be inquired into.

In this particular case Mr. Lopez, as I understand the facts, among other things, held a news conference at which he communicated certain information the world. In addition, he appeared before Inspector Borden and again made communications, another obvious third party, Inspector Borden being with an enforcement agency, certainly not somebody who was part of the defense team.

So initially, your Honor, we have the point that the attorney-client privilege which normally exists has been clearly opened up wide on this issue and Mr. Lopez can be compelled to testify about it because he already has talked about it publicly.

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3 Then we say, and this has been alluded to by
4 counsel and I suppose quite properly, well, this has a
5 dreadful pragmatic effect on this case with this
6 jury in this courtroom.

7 Well, our answer to that, your Honor, is we
8 recognize that is a problem. We don't sympathize too
9 much with what has been referred to as a Hobson's choice
10 because the defendants obviously are free to choose, but
11 it seems to me they are not free to choose both sides
12 of the same coin at the same time.

13 That pragmatic problem, your Honor, can
14 be avoided in a very simple way. If Mr. Lopez is willing
15 to stipulate that an attorney authorized to speak
16 for the defendant DiNapoli made these statements, without
17 conceding or stipulating as to their admissibility or
18 their relevance or anything else, then the question of
19 Mr. Lopez and his defendant's prejudice in the eyes of
20 this jury and Mr. Lopez' prejudice which might inure to
21 other defendants as it was suggested -- I don't agree with
22 it but it was suggested -- is obviated.

23 That is the first part of the government's
24 position.

25 Second, your Honor, on the so-called agency
question I think probably this is not technically agency

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2 as we discussed the law of principal agent. However,
3 I do think it is well established, your Honor, and I
4 hope to submit some cases on it, that a lawyer who is
5 authorized to speak for a client in civil litigation
6 or in criminal litigation speaks for that client, and when
7 a lawyer says something that inures to the client's
8 benefit in a case, or if he said something that inures
9 to the client's prejudice that can be admissible against
10 the client, he becomes for a very limited purpose the
11 client's agent.

12 It is not principal agent or the law of agency
13 but it is a well-recognized doctrine that someone who has
14 been referred as an inquirer to a third person as
15 authorized to answer for him, that person, in this case
16 DiNapoli, is bound by such answers and the statements
17 made are admissible against the referrer.

18 We can prove in a hearing outside of the pre-
19 sence of the jury that Mr. Lopez did indeed act on behalf
20 of the defendant DiNapoli when the statements were
21 made and was indeed authorized to act for the defendant
22 DiNapoli when the statements were made and we are prepared,
23 as I said, your Honor, to obviate the problem of Mr.
24 Lopez' name by entering into an appropriate stipulation.
25 That is the government's position, your Honor.

2 THE COURT: How about the situation -- don't
3 go away, Mr. Curran -- how about this situation:
4 This is something which happens on practically a daily
5 basis. The lawyer is retained by a criminal defend-
6 ant and in connection with his representation of that
7 client he approaches the prosecutor and the prosecutor's
8 agents saying, "I think I am going to plead my man guilty
9 because he is guilty. What kind of a deal can I get
10 from the prosecutor?"

11 Could you put the lawyer on the stand and
12 have him testify as to that?

13 MR. CURRAN: No, your Honor.

14 THE COURT: What is the difference?

15 MR. CURRAN: I think there is a tremendous
16 difference.

17 In that case, your Honor, when a lawyer
18 comes in and says, "I think I am going to plead my man
19 guilty," and even if he says, "Because he is guilty," that,
20 as your Honor well knows, is a question of the law which
21 does not go to facts. We are not talking about a lawyer
22 saying something like that. That is an ultimate legal
23 answer to an issue. We are talking here about --

24 THE COURT: Suppose he goes further. He
25 goes on to say, "My man was at the Rinkydink Motel and

there transferred 14 kilos of heroin to the other defendants and he wants to cooperate." What is the difference now?

MR. CURRAN: I think the difference, your Honor, is a fundamental one. As your Honor well knows, attorneys do that all the time with prosecutors. There is, I believe, a common understanding, sometimes expressed, always implied, that this is a communication with the prosecutor which is being presented on an off-the-record without attribution basis to the client. That is a general understanding, very frequently it is expressed before the conversation takes place, but it is always implied in those situations.

We are not talking about that here, your Honor. We are talking about a situation where someone holds --

THE COURT: Mr. Lopez got on television.

MR. CURRAN: Whatever he did, but he held a news conference and also talked to someone else and talked about facts, facts in the case, and then in this courtroom is presenting and is presumably going to argue to the jury facts which are directly contrary to the facts asserted publicly when he said, as we understand it, he was authorized to speak for his client and the

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person certainly was then his client.

That I think is an entirely different situation,
your Honor.

I will put another one, your Honor, if I
might. Say in a civil litigation --

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THE COURT: Don't say in a civil litigation, because civil litigations are entirely different.

In a civil litigation an attorney can act for a client, very clearly. He can settle a case and file a stipulation of discontinuance and even if the client is unhappy with it he is stuck with it.

In certain civil litigations, in fact, under the construction of certain statutes, an attorney is an agent, employee or affiliate. I can think of a number of such situations. Patent law would apply, Investment Company Act, investment advisers and so on and so forth.

But we are not in civil litigation, we are in criminal litigation.

Under the circumstances, I believe that the prejudice and the possibility of permanent damage in this case by calling Mr. Lopez is so great that I am not going to permit it.

MR. CURRAN: Your Honor, the government has suggested what we believe to be a reasonable way around that. We admit that there is a certain amount of prejudice in misstatements, but the statements aren't of the government's doing, they are relative and they bear on this case, and I suggest, your Honor, that if a lawyer develops facts and represents someone and goes out and holds a news conference

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2 and relates a story on behalf of his client and then in a
3 case a few months later comes in and predicates a defense
4 in an entirely different direction, the government has a
5 right and an obligation to pursue and to present to the
6 jury what the client's story has been.

7 That is really boiled down what we want to do
8 here. We have a way, as I said, of getting around this
9 problem of Mr. Lopez's name ever getting before the jury
10 in this connection.

11 THE COURT: Even without Mr. Lopez's name getting
12 before the jury, I am still not going to permit it.

13 All right. Let us find out what else is open.

14 Mr. Rosenberg, are we still going to have that
15 Wade hearing?

16 MR. ROSENBERG: I spoke to the government about
17 it, your Honor. Depending upon what comes out on their
18 redirect, I may waive it, if nothing comes out, any more
19 with respect to my client.

20 If there is anything that does come out, then I
21 must pursue it.

22 -THE COURT: Mr. Phillips, how long do you expect
23 to be on your rebuttal case?

24 MR. PHILLIPS: I don't think we will be more
25 than 45 minutes, a half-hour, your Honor, maybe an hour at

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2 the most.

3 THE COURT: We can decide on the other problem
4 then.

5 Is there anybody else who has any open matters
6 that I --

7 MR. FISHER: Yes.

8 THE COURT: I have it all written down on a piece
9 of paper outside which I don't have right here.

10 MR. LOPEZ: Your Honor, I have just that one
11 stipulation.

12 THE COURT: The stipulation as to what?

13 MR. LOPEZ: As to the dismissal of the United
14 States Magistrate's complaint.

15 THE COURT: Yes. That I understand is agreed
16 to.

17 MR. LOPEZ: Already agreed to.

18 THE COURT: All right. Mr. Siegal, do you
19 have any objection to the stipulation as to the dates which
20 Mr. Lentini was incarcerated?

21 MR. SIEGAL: No, not as agreed upon between myself
22 and Mr. Phillips.

23 THE COURT: Let us wind up these things.
24 Everything, then, is in order? Mr. Ellis?

25 MR. ELLIS: Your Honor, I have an open matter

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2 on an application before your Honor with respect to the .
3 alleged Di Napoli-Mamone partnership, the right of the
4 government to refer to Barnaba's testimony that he heard
5 on the street --

6 THE COURT: That is in summation. That is
7 what you are talking about?

8 MR. ELLIS: Yes, sir.

9 THE COURT: I am going to take care of that.

10 MRS. ROSNER: We are going to rest, your Honor.

11 THE COURT: All right.

12 It looks like we are in fairly decent shape to
13 wind up today.

14 MR. LOPEZ: Yes. As far as the newspaper
15 articles, shall I point to that?

16 THE COURT: Come on, put it in.

17 MR. LOPEZ: Your Honor, as Court Exhibit 69 we
18 offer the Daily News story, February 7, 1974, entitled
19 "Tramunti Trial Delayed By Death."

20 As Court Exhibit No. 70, the New York Post
21 article of February 8, 1974, "Jury Told About Drug Trans-
22 action."

23 THE COURT: Hold on for a second, Mr. Lopez.
24 Why don't we just mark them all and if the Court of Appeals
25 is interested in them let them read it.

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2 MR. LOPEZ: Fine. Thank you very much, your
3 Honor. They would run exhibits up to 75, just for the
4 record.

5 THE COURT: Did you get that headline yesterday?

6 MR. LOPEZ: Yes, your Honor.

7 THE COURT: All right.

8 MR. RICHMAN: It was in The Times, also, your
9 Honor.

10 THE COURT: It was in The Times, also?

11 MR. RICHMAN: Yes. The third page, the second
12 section.

13 THE COURT: I assume that the Court of Appeals
14 can take judicial notice of the third page of the second
15 section --

16 MR. RICHMAN: Page 33, your Honor. I will offer
17 it.

18 THE COURT: All right.

19 (Court Exhibits 69 through 76, respectively,
20 marked for identification.)

21 THE COURT: Let me check on Mr. Fisher's offers.
22 We will take the stipulations, rest, and I assume, Mr.
23 Phillips, you are also to go on the rebuttal?

24 MR. PHILLIPS: Yes, your Honor.

25 What I would like to do, your Honor, is to

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2 read first the stipulation that I have shown in writing to
3 Mr. Siegal and Mrs. Rosner indicating that that is really
4 part of the government's direct case and then proceed with
5 the government's rebuttal case.

6 THE COURT: Okay. You are a purist at heart.

7 MR. PHILLIPS: I just won't want to confuse the
8 jury, your Honor.

9 MR. ROSENBAUM: I know I was late coming in, but
10 I told your Honor yesterday I would advise the Court this
11 morning whether or not D'Amico would have one witness or
12 rest.

13 Your Honor, the defendant D'Amico does rest.

14 THE COURT: All right, fine.

15 Yes, Mr. King?

16 MR. KING: Your Honor, I have noticed in The
17 Times in the last few days several stories regarding
18 indicted defendants becoming government witnesses.

19 I know you appointed Mr. Ellis as censor for
20 all on behalf of the defendants, and as I understand it,
21 Mr. Ellis is probably asking the marshal to excise any
22 reference to this trial. It would seem to me --

23 THE COURT: Hold on for a minute, Mr. King.

24 The marshal under the order which I entered was
25 to excise all reference to any trials, civil or criminal,

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2 any litigation.

3 MR. KING: Outside of this?

4 THE COURT: Anything.

5 MR. KING: Then I misunderstood. I was going
6 to suggest that that be excised, too.

7 THE COURT: No, no. Anything involving any
8 civil or criminal matters.

9 MR. ELLIS: I want to say at this point, your
10 Honor, that I have been checking from time to time and they
11 are doing the job well.

12 THE COURT: Fine.

13 See you back here in five minutes.

14 (Recess.)

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(In open court; jury not present.)

THE COURT: Mr. Fisher, you are the last item on the agenda today. Basically, I understand you are interested in putting in three bits of testimony which will be stipulated to by the government, is that correct?

MR. FISHER: That's correct.

THE COURT: All three of them basically go to Stasi's motive, is that correct?

MR. FISHER: Yes, your Honor.

THE COURT: There was one that you started on and I understand it is withdrawn.

MR. FISHER: Yes.

THE COURT: All right. You can put in the three pieces.

MR. FISHER: Thank you.

THE COURT: Are we set to go then?

MR. PHILLIPS: Is your Honor going to permit --

THE COURT: Yes.

MR. PHILLIPS: If that is the case, your Honor, we would like to offer two things. I brought these to the attention of Mr. Fisher and I think he indicated he did not object.

One of them is in connection with --if I may have a moment, I need that piece of paper.

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2 THE COURT: All right.

3 MR. PHILLIPS: Page 78 of C476, which is
4 Government's Exhibit 3516-A for identification, Mr.
5 Fisher is offering a portion that appears on page 78.
6 The government would offer the following, which appears
7 at the bottom of 79 and goes over to the top of page 80.
8 It is stated by a voice, but I think we can agree it's
9 one of the detectives or Sergeant O'Boyle or Lieutenant
10 Whelan. The voice says to Mr. Stasi, "All right, so we'll
11 do the best we can. You recollect as much as you can,
12 and based on what the facts are and what you tell us, and
13 if the truth doesn't change you're not going to be hurt
14 by it."

15 MR. FISHER: No objection, your Honor.

16 THE COURT: All right.

17 MR. PHILLIPS: The other thing was Mr. Fisher
18 is offering from page 18 of C425, Government's Exhibit
19 3525-A for identification, a statement by a person who is
20 not identified in the transcript, but the government has
21 listened to the tape and Mr. Fisher has agreed to stipulate
22 that that individual is Sergeant O'Boyle.

23 MR. FISHER: No objection.

24 THE COURT: All right.

25 Bring back the jury.

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2 Mrs. Rosner, I assume you rest.

3 MRS. ROSNER: Yes, sir.

4 (Jury present.)

5 THE COURT: Good morning, ladies and gentlemen.
6 You know, when you come out a little late and I say good
7 morning, I want you to know we have been working out here.
8 Today I am going to prove it.

9 Mr. Lopez, at this point I believe you wish to
10 offer a stipulation.

11 MR. LOPEZ: Yes, your Honor. The defendant Di
12 Napoli and the government stipulate that the United States
13 Magistrate's complaint resulting from the arrest of February
14 3, 1972, was dismissed by the government on or about April 1,
15 1972.

16 With that --

17 THE COURT: And that is agreed to by the
18 government.

19 MR. PHILLIPS: So stipulated, your Honor.

20 THE COURT: All right.

21 MR. LOPEZ: The defendant Di Napoli rests,
22 your Honor.

23 THE COURT: All right. Mr. Fisher, I understand
24 that you have a stipulation.

25 MR. FISHER: A number of them, your Honor.

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2 First, if your Honorplease, may this be deemed
3 marked as Defendant Christiano's Exhibit A for identifi-
4 cation.

5 THE COURT: Sure.

6 (Defendant Christiano's Exhibit A deemed
7 for identification.)

8 MR. FISHER: Ladies and gentlemen of the jury,
9 the government and I on behalf of Mr. Christiano have
10 stipulated that this is the instrument used by Mr. Barnaba
11 on the night he claims to have had his conversation with my
12 client, November 22, 1972, that it was fully operable, and
13 that it was worn in the following manner:

14 The machine itself was taped to his right thigh.
15 An on-off switch, this, was somehow wired under his
16 clothing into his left pocket, and was operable, such as
17 this. That would turn the machine on and off as well as
18 the recording capability on and off. The microphone was
19 taped to his body in this way and placed somewhere about
20 here.

21 THE COURT: Indicating the chest.

22 MR. FISHER: Yes. Thank you, your Honor.

23 I would offer Defendant's Exhibit A, if your
24 Honor please.
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2 MR. PHILLIPS: No objection.

3 MR. CURRAN: No objection, your Honor.

4 THE COURT: All right.

xx 5 (Defendant Christiano Exhibit A received in
6 evidence.)

7 MR. FISHER: In addition, ladies and gentlemen,
8 the government and I on behalf of Mr. Christiano have
9 stipulated that on May 24, 1973, Mr. Stasi was debriefed
10 and that during that debriefing Mr. O'Boyle spoke as
11 follows to him, reading from page 18, Government's Exhibit
12 3525-A for identification, if your Honor please:

13 "Frank, some weeks from now or a couple of
14 months from now maybe the Lieutenant will have to tell
15 Rogers what you did and they'll evaluate that. And if
16 you have done a terrific fucking job -- it may not take long
17 if you know the right people and do to the right things --
18 some day Rogers is going to wipe your slate clean.

19 "But if you just fuck around and give us a little
20 information about this guy and three weeks later you haven't
21 got anything, or four weeks -- you still owe everything
22 you owe today."

23 That is the same O'Boyle who testified here,
24 Sergeant O'Boyle.

25 On July 10, 1973, again Mr. Stasi was debriefed.

Referring to Government's Exhibit 3513-A for identification, if your Honor please, the last line of 26 going to 27, a voice, presumably one of his interrogators, said as follows:

"Here's what you got to look forward to.

"Mr. Stasi: Yeah.

"Voice: A nice relaxing month or so here with us for company, keeping good, maybe no broads but you --

"Stasi: All right. I don't care.

"Voice: Second, a pot of gold and an airplane ticket, where you want to go, and a new identity, and you'll be as safe as if you were in your mother's arms."

Finally, with regard to Government's Exhibit 3516-A for identification, the debriefing the following day, July 11, reading from page 78, if your Honor please, Stasi is told by one of his interrogators:

"So now you're going to ride or fall by how you're going to perform for Rogers there."

Defendant Christiano rests, your Honor.

May this exhibit be passed amongst the jury.

THE COURT: The Nagra?

MR. FISHER: Yes.

THE COURT: Sure.

(Pause.)

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2 THE COURT: Mr. Phillips.

3 MR. PHILLIPS: Has the defense rested entirely,
4 your Honor?

5 THE COURT: It's my understanding that every
6 defendant at this point has rested. Is that correct?

7 MR. LOPEZ: Yes, your Honor.

8 THE COURT: All right.

9 MR. PHILLIPS Your Honor, the first thing is
10 in connection with defendant Christiano's reading from
11 Government's Exhibit 3516-A for identification.

12 Mr. Fisher read from page 78 and the government
13 would read from the bottom of page 79 as follows, a voice
14 saying to Stasi, the voice not being identified, but it
15 has been stipulated that it's either Lieutenant Whalen,
16 Sergeant O'Boyle or one of the detectives working under
17 their direction:

18 "All right, so we'll do the best we can. You
19 recollect as much as you can, and based on what the facts
20 are and what you tell us, and if the truth doesn't change
21 you're not going to be hurt by it."

22 The next thing, your Honor, is a stipulation
23 which is part of the government's direct case, not part
24 of the government's rebuttal case. It reads as follows:

25 "It is hereby stipulated and agreed by and

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2 between the defendants and the government that if the
3 appropriate witnesses were called they would testify as
4 follows.

5 Excuse me, your Honor. I am reading from the
6 wrong stipulation.

7 THE COURT: How about that.

8 MR. PHILLIPS: Thomas Lentini or Moe Lentini
9 was arrested on federal charges on April 14, 1973; that
10 on April 16, 1973, Lentini was arraigned and bail was set
11 in his case in the amount of \$75,000 cash or surety; that
12 Lentini was remanded in custody to the Federal Detention
13 Headquarters, West Street, New York, New York, in lieu of
14 bail; that on May 3, 1973, bail was reduced to \$75,000
15 personal recognizance bond co-signed by Lentini's two
16 brothers, Michael and Joseph Lentini, and a family friend
17 by the name of Vincent Trapani, and secured by \$25,000 cash
18 or surety; that on May 4, 1973, Lentini made this bail and
19 was released; the \$25,000 bond was put up by the Stuyves-
20 ant Insurance Company and the bonding company surety was a
21 deed of Mr. Trapani's.

22 In rebuttal, your Honor, the government calls
23 Mario Tenore.
24
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2 M A R I O T E N O R E, called as a witness on behalf
3 of the government in rebuttal, being first duly
4 sworn, testified as follows:

5 THE COURT: Go ahead, Mr. Phillips.

6 DIRECT EXAMINATION

7 BY MR. PHILLIPS:

8 Q Mr. Tenore, by whom are you employed?

9 A Howard Johnson's Company.

10 Q And where do you work?

11 A Ridgfield Park, Howard Johnson Motor Lodge,
12 Ridgfield Park, New Jersey.

13 Q What route is that on, if any? Is that next
14 to a highway?

15 A It's Route 46, Eastbound.

16 Q Is that near the New Jersey Turnpike?

17 A Yes, right at the exit, Exit 18 of the Turnpike.

18 Q What is your position there with Howard Johnson?

19 A I am the manager.

20 Q How long have you been the manager?

21 A Ever since June, 1973.
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MR. PHILLIPS: May this be marked as the
next government's exhibit.

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(Government's Exhibit 109 marked for identi-
fication.)

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BY MR. PHILLIPS:

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Q Are you the manager of the motel or the
restaurant?

9

A Motor lodge, the motel.

10

11

12

Q I show you what have been marked Government's
Exhibits 107 for identification and 108 for identifica-
tion. Can you tell us what those documents are?

13

A These are registration cards that we use.

14

15

Q Are those cards made out in the regular course
of your business?

16

A Yes, sir.

17

18

Q And is it the regular course of your business
to make out those cards?

19

A Yes, sir.

20

21

Q Is it the regular course of your business to
keep those cards?

22

A Yes, sir.

23

24

25

Q Do the entries appearing on those cards reflect
transactions that occurred at or about the time the
entries were made?

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2 A Yes, sir.

3 Q Were those cards kept in your custody?

4 A Yes, sir.

5 Q Did you turn those cards over to an agent from
6 the Drug Enforcement Administration?

7 A Yes, sir.

8 Q When was that, do you recall?

9 A January 15, 1974.

10 MR. PHILLIPS: At this time, if the court
11 please, the government offers Government's Exhibits 104
12 for identification, 107 for identification, 108 for
13 identification and 109 for identification.

14 MR. POLLAK: May I examine on voir dire,
15 your Honor?

16 THE COURT: Sure.

17 VOIR DIRE EXAMINATION

18 BY MR. POLLAK:

19 Q I show you Exhibit 107 for identification, Mr.
20 Tenore, and I ask you is there anything on there to
21 indicate what year it was --

22 A On this particular one, no, but --

23 Q Thank you, sir.

24 A You can tell by the number. The year you
25 can tell by the number. Every registration card has

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a number.

Q There is more than one one Howard Johnson's Motor Lodge in New Jersey, isn't there?

A Yes.

Q As a matter of fact, how many are there, if you know?

A Five, six, seven. I don't know.

Q Is there anything on that card to indicate which Howard Johnson's Motor Lodge it is?

A First of all, I can tell you by the writing. That's my assistant's writing. The entries made at the bottom are my assistant's writing.

Q You have been working there since June, 1973, right?

A Yes, sir.

Q So that this particular thing was in 1973, right?

A Yes, sir.

Q So that this particular thing was in 1973, right?

A Not necessarily. My assistant has been there for 15 years.

Q So you have no idea what year that card was made out, do you?

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2 A I can find out very easily.

3 Q As of right now you have no idea?

4 A At this minute, no.

5 Q Thank you, sir.

6 MR. POLLAK: May I have a conference at
7 the side bar, your Honor?

8 THE COURT: - Sure.

9 MR. PHILLIPS: Before the conference, your
10 Honor, may I ask the witness a few questions?

11 THE COURT: Let's see what happens.

12 (At the side bar.)

13 MR. LEIGHTON: Judge, before Mr. Pollak goes,
14 I will object to 109 coming into evidence on the basis
15 that it is not proper rebuttal. I think the only argu-
16 ment the government could make is that Mr. Salley opened
17 up the door when he testified.

18 However, Mr. Salley's card shows November
19 of some year that is not there, the card that the govern-
20 ment is alleging belongs to Mr. Robinson is for June.

21 So I don't think that Mr. Robinson in any way
22 opened the door to his being there or not being there.
23 So I would object to this.

24 THE COURT: All right.

25 MR. LEIGHTON: I would also ask for a

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voir dire, depending on what your Honor's ruling is.
I don't want the jury, unless I have to, to see that
I have to ask questions.

THE COURT: I understand.

MR. POLLAK: I will join in Mr. Leighton's
objection to 109.

With respect to No. 107, my objection is that
the witness is unable to identify the year of this card
and his testimony as to where -- I don't know how that
got on the back; that is obviously afterwards -- with
regard to location, which of the Howard Johnson's, he is
also unable to testify as to that.

Furthermore, I believe this is not under the
shopbook rule, because this witness, if, as I assume the
government contends, this card was in November of
1972, this witness was not even there. Therefore, he
is not in a position to testify as to November, 1972, to
lay the proper foundation for the admission of this.

Now, with respect to No. 108 and 104, I would
object. With regard to No. 104, I object because it
is prejudicial, showing a fingerprint chart and indicating
his last name as an alias, and I submit that that is
objectionable. It has no probative value whatsoever.
With regard to 108, I also suggest that it has no relevance

and no probative value.

Now, on his cross examination yesterday it is true that Salley stated that the No. 107 was not his signature. However, subsequently, on cross examination, he admitted to having stayed at a Howard Johnson's at some time after his father's death in October, 1972, and therefore I submit that at this point to admit 103 and 104 would only be prejudicial because there is no need for the handwriting analysis at this time.

MR. PHILLIPS: Your Honor, with respect to 104, there is nothing prejudicial about it, because it doesn't show any prior record. The fingerprints were taken when he, as he said on cross examination, voluntarily surrendered himself to the officers of the DEA. So there is nothing prejudicial about that. It is only redundant, the fact that the alias Salley appears there, because he admitted he gave the name Salley as an alias to the agents on cross examination. So there is nothing prejudicial about that.

With respect to Government's Exhibit 108 for identification, he signed this at the direction of your Honor after, on cross examination in the morning, he claimed that the signature on 107 for identification was not his signature. I think the jury is entitled

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to be able to compare his signature, particularly in view of his testimony on cross examination, to determine whether or not he was telling the truth, after having agreed that 105 in evidence has his signature and 104 for identification has his signature. The jury should be entitled to consider the weight to be given to his testimony generally by having them compare his known handwriting against that he gave at the direction of the court, Government's Exhibit 107 for identification.

With respect to the year, I intend to ask the witness further questions to elicit what year these cards represent.

MR. POLLAK: The witness has already testified, Mr. Phillips; that he doesn't know what year. I will therefore object to further questioning along that line.

THE COURT: Do you have any other voir dire? ---

MR. POLLAK: No.

MR. LEIGHTON: Depending on your Honor's ruling --

MR. PHILLIPS: I did not address myself to this, your Honor.

THE COURT: All right.

MR. PHILLIPS: It seems to me this is properly

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admissible at this time both as against Warren Robinson and as against Salley, as rebuttal against Salley's testimony for completeness, to show that Robinson also stayed at this motel that was being used by these people as a place to have narcotics transactions.

It seems to me it is also admissible against Robinson even though he didn't offer any rebuttal testimony as part of the government's direct case to corroborate the testimony of Pannirello and Provitera.

THE COURT: Mr. Sunden, you want to say something?

MR. SUNDEN: It is not related to this. It is just that I noticed that Agent Nolan is seated at the prosecution table and I strongly object to this. This was raised earlier.

THE COURT: He is not going to get back on the stand.

MR. PHILLIPS: I don't intend to put him on the stand. I don't know what Mr. Sunden's objection is.

MR. SUNDEN: He was on the stand, wasn't he?

MR. PHILLIPS: Yes.

MR. SUNDEN: No. 1, initially, I asked

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that all witnesses be excluded, and secondly, I per-

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sonally have very strong feelings that where you have

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somebody who is a witness, where his credibility is to

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be determined by the jury, when he sits at the counsel

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table -- I made a suggestion at the beginning of the

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trial -- when he sits at the counsel table he becomes

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vested with the cloak of impartiality that all the

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attorneys are supposed to have, in this case the attorneys

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for the government, Mr. Phillips and Mr. Curran, and that

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shield is supposed to be the difference between attorneys

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who are dispassionately arguing a case but have no direct

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knowledge of it, and the credibility of the witness is

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broken, he takes on some of the authority of the cloak

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when sitting at the table.

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MR. PHILLIPS: Since when has an attorney

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dispassionately argued a case in any courtroom at any

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time?

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MR. SUNDEN: That is a different thing.

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I have very, very strong feelings about that. I would

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ask that you direct him to leave the table and not come

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there again.

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MR. ENGEL: I don't think a direction to

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the jury is required.

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THE COURT: I don't think so.

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Do you need him here for any reason?

MR. PHILLIPS: I wanted to ask him some questions, but I think Mr. Fortuin has asked the questions that I wanted to ask him and I think he has answered them completely.

THE COURT: All right. 107 and 108 will be received in evidence. 109 as to Warren Robinson will not be. 104, the fingerprint card, will not be.

(In open court.)

(Government's Exhibits 107 and 108 were re-

ceived in evidence.)

BY MR. PHILLIPS:

Q Can you tell from looking at this card,

Mr. Tenore, what year that card refers to?

MR. POLLAK: Objection, your Honor. That

is asked and answered. The witness stated he did not

know the year today.

THE COURT: He didn't have the card in

front of him at that time, I don't believe.

MR. POLLAK: Yes, he did.

THE COURT: If he is going to say no again

he will say no again.

You can answer.

Q Can you tell us what year that refers to?

- A By looking at the card right now, I cannot.

Q You gave that to an agent of the Drug Enforce-

ment Administration, is that correct?

A Yes, sir.

Q And what agent did you give it to, do you

recall?

A I have a receipt from them.

Q I just want the name of the agent.

1 A Well, I can't remember.

2
3 THE COURT: He is going to have to look at
4 his receipt.

5 A Mr. John Nolan and then is Checkaway.

6 Q When you gave it to Agent Nolan did you take
7 it from a particular file?

8 A Yes, I did, but I don't remember the year we
9 took it out from.

10 Q You don't remember, sitting there on the wit-
11 ness stand?

12 A Not right now, I don't remember.

13 Q How long would it take you to find out?

14 A A telephone call.

15 MR. POLLAK: I would object to such a pro-
16 cedure, because that would be clearly hearsay.

17 THE COURT: Yes.

18 MR. PHILLIPS: Your Honor, I have no fur-
19 ther questions at this time.

20 I would like to pass Government's Exhibits 107
21 in evidence and 108 in evidence to the jury.

22 MR. POLLAK: Your Honor, just a moment.

23 THE COURT: Hold on.

24 MR. POLLAK: I believe there are some nota-
25 tions on the back of that card that may not have been --

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2 THE COURT: That is right. Why don't
3 you hold off passing either one of them right now.

4 Do you have any cross examination, anyone?

5 All right, sir, you may step down.

6 (Witness excused.)

7 THE COURT: Call your next witness.

8 MR. PHILLIPS: The government calls Armando
9 Tognino.

10 MR. WARNER: Your Honor, may I approach the
11 side bar?

12 (At the side bar.)

13 MR. WARNER: Your Honor, at this time I
14 would ask that the government put forth an offer of proof
15 as to what testimony they intend to elicit from this
16 witness, because it is my belief based on a reading of
17 the transcript that the government will seek to elicit
18 only information that is more properly part of their
19 direct case and not be rebutting information put forth
20 by the defendant Ceriale in his direct case.

21 MR. PHILLIPS: I would like to point out to
22 your Honor that on page 30 of the transcript Mr. Warner
23 explicitly stated to the jury in this case that Mr.
24 Ceriale was going to take the witness stand --

25 THE COURT: I am not worried about that.

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2 MR. WARNER: That was in good faith, your
3 Honor.

4 THE COURT: I am not saying it is not.

5 MR. PHILLIPS: I am not saying it is not
6 in good faith.

7 MR. WARNER: It is not evidence either.

8 MR. PHILLIPS: In light of Mr. Warner's
9 representation to the jury the government would (a) ask
10 permission to reopen its case to produce this witness who
11 owns a barbershop on Pleasant Avenue and who knows Cerialle
12 by the name Joe D., the nickname that Mr. Stasi gave on
13 direct examination.

14 Further, it would offer this witness in
15 rebuttal of Mr. Cerialle's defense that he was never known
16 as Joe Red and therefore Mr. Stasi was making up the fact
17 of his dealings with Mr. Cerialle.

18 I would submit it was proper rebuttal testimony
19 in light of the defense put --

20 THE COURT: That he was known as Joe Red.
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2 MR. WARNER: This barber is going to testify
3 that he was Joe Red?

4 MR. PHILLIPS: No, Joe D.

5 I would further submit it 's proper in light of
6 Mr. Warner's representation that Cerialle was going to take
7 the stand as part of the government's direct case.

8 I would cite for authority, your Honor, the
9 case of United States v. Sweig. The attorney for Sweig
10 stated to the jury in his opening that Sweig would take
11 the witness stand. As a result, the government didn't call
12 certain witnesses. When Sweig rested without taking the
13 witness stand, the government asked Judge Frankel for
14 permission to reopen its case and call the witnesses it
15 didn't call and Judge Frankel permitted the government to
16 put in two days of testimony that they were going to put in
17 on direct but in view of Sweig's representation to the
18 jury they did not put on.

19 MR. WARNER: There is a very crucial distinction.
20 When Mr. Phillips had Mr. Stasi take the stand and say that
21 my client was Joe D, I didn't even cross-examine him,
22 I never contested it, your Honor, and it has never been
23 contested.

24 MR. PHILLIPS: I submit this corroborates Stasi
25 that he is known as Joe D.

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2 THE COURT: What has it to do with rebuttal?
3 You were the purist.

4 MR. PHILLIPS: My argument is that it was part
5 of the government's direct case and the government would
6 ask permission to open its direct case because of Ceriale's
7 failure to take the stand as represented by Mr. Warner.

8 THE COURT: No.

9 MR. PHILLIPS: It was further Ceriale's defense
10 that he was a hard-working man and Mr. Warner is going to
11 argue that he did not spend as many days and as much time as
12 contended by the government through the testimony of Mr.
13 Stasi in the barbershop and this barber is going to testify
14 to the contrary. There are two or three witnesses that
15 he produced showing he was a hard worker, he worked so hard
16 that he didn't spend that much time at the barbershop.

17 THE COURT: Oh, no. He worked on shift, so what
18 is the difference.

19 (In open court.)

20 THE COURT: Mr. Phillips, I believe that you
21 are withdrawing the offer of the gentleman whose name I can't
22 pronounce.

23 MR. PHILLIPS: Yes, I am, your Honor.

24 THE COURT: All right.

25 MR. PHILLIPS: May we approach the bench?

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2 THE COURT: Let me get the clerk's.

3 (Pause.)

4 (At the side bar.)

5 MR. PHILLIPS: The government's rebuttal case is
6 finished, with the exception of Mr. Curran's witness. I
7 think he told you he couldn't be here until this afternoon.

8 With the exception --

9 THE COURT: I am not even sure that Mr. Curran
10 has such a witness.

11 MR. PHILLIPS: Assuming he has such a witness.

12 The other thing is that this card relates to
13 1972, which the government intends to prove one of three
14 ways; either through the testimony of Agent Nolan that
15 this person, when he gave the card to him on January 15th,
16 took it from a file marked or box marked 1972, or through
17 a stipulation or through bringing another witness that we
18 can produce by this afternoon.

19 THE COURT: Let us get the jury out of here right
20 now. That is the first and most important thing.

21 MR. PHILLIPS: Sure.

22 (In open court.)

23 THE COURT: You didn't have a break this morning.
24 You are going to have one right now.

25 Mr. Marshal, will you escort the jury from the

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2 room.

3 Everybody else please be seated.

4 (The jury left the courtroom.)

5 THE COURT: Unfortunately, we have reached one
6 of those hiatuses which occur because we can't control the
7 world about us.

8 I gather that there may be one other government
9 rebuttal witness, but he will not be here until about 2
10 o'clock this afternoon. It is unfortunate. These things
11 happen.

12 In view of the circumstances, I guess we are
13 just going to have an extended luncheon break.

14 Have a pleasant lunch.

15 (Luncheon recess.)
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AFTERNOON SESSION(2:00 p.m.)

(In open court; jury not present.)

MR. RICHMAN: If the court please, I would like to make an application for a statement at least.

Your Honor, two days ago a witness who testified, a detective or former detective, John Mullins. He was a confidential investigator with the attorney general of the State of New York. One hour after leaving this courtroom his employer received a telephone call from Mr. Curran and now Mr. Mullins is no longer employed with the attorney general of the State of New York.

I find that highly improper, if not an intimidation of all the witnesses in this case. I don't know what other witnesses these defendants could have produced if they are going to be intimidated by this kind of method. What happens if we win, do we all get indicted?

MR. LEIGHTON: I hope not.

MR. CURRAN: May I reply?

THE COURT: Yes.

MR. CURRAN: Without any histrionics on it I will be glad to relate exactly what transpired.

This office, the United States Attorney's Office,

has a policy, as I believe all enforcement and law officers do, that if someone from my office is called to be a character witness we obviously have no objection to that if he wants to be a character witness. We have a rule though that if it involves a matter with another agency of the government the person is required to notify his superior that he has been asked to testify, simply to tell him that fact.

In this particular case I wanted to do two things: I wanted to make absolutely sure that this witness was indeed a confidential investigator for the New York State attorney general. I felt I had a right to do that. I called Judge Lefkowitz and spoke to him briefly and said the man had appeared and asked him if he worked for him. Judge Lefkowitz said he didn't know if he worked for him or not; he said he would check it out.

He called me back and he said he did indeed work for him, and Judge Lefkowitz said he had a firm rule that anyone working for him advise his superior in any kind of a case, character witness or otherwise.

I made it very clear I was not complaining in any way about anyone appearing as a character witness or any other kind of a witness, except I told him that our

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2 policy was one of notification to his officers should the
3 tables be turned or reversed.

4 I have no knowledge as to whether Mr. Mullins
5 has been relieved of his position or not. I made no re-
6 quest of any kind, direct or indirect, express or implied,
7 to Judge Lefkowitz that any disciplinary action be taken
8 or any retribution of any kind.

9 MR. RICHMAN: If the court pleases, any such
10 rule or regulation is clearly unconstitutional. A man
11 has a right to testify.

12 MR. CURRAN: I never said he didn't.

13 MR. RICHMAN: It is my understanding that one
14 of the officers who testified on behalf of Mr. DiNapoli,
15 after testifying on his behalf, he was fired from his
16 job and in addition was subpoenaed to the grand jury.
17 Then the mother of Harry Pannirello, she was subpoenaed
18 to the grand jury. Then Mr. Tolopka's car is expropriated
19 from him and now this happens. What kind of tactics
20 are these?

21 We have lived together for seven weeks. We
22 have gone through virtual hell together. Now this
23 is nonsense. How can these men have a fair trial if
24 their witnesses are going to be intimidated?

25 MR. CURRAN: Your Honor, just one brief

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2 comment. I assume Mr. Richman is referring to former
3 detective, then patrolman, now I understand civilian,
4 Spurdis.

5 Your Honor saw Mr. Spurdis and your Honor had
6 something to say about his testimony. There has been
7 no retribution by this office of any kind against him.
8 My understanding is he had been before a grand jury away
9 before that hearing and I have no knowledge of what has
10 happened to him in the Police Department, except I have
11 heard he is no longer a police officer.

12 This office had absolutely nothing to do,
13 to date at least, with any action against Mr. Spurdis.

14 MR. RICHMAN: Your Honor, I would ask at this
15 time to have a continuance until Monday morning to
16 produce Mr. Mullins and let the jury draw their own con-
17 clusions, and the basis for that, sir, is if Mr. Curran
18 can bring out from Joe Sharp's wife that she felt in-
19 timidated by Mr. Pugliese, certainly we can show the
20 pressures that we are receiving.

21 MR. CURRAN: Your Honor, I have no ---

22 THE COURT: No.

23 MR. CURRAN: I have no objection to that,
24 but I want to serve notice now if that is permitted I
25 am going to produce Attorney General Lefkowitz in court.

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2 MR. ROSENBERG: Good, bring him in.

3 MR. FISHER: That is the best deal I have
4 heard.

5 THE COURT: Come on.

6 MR. FISHER: Agreed, your Honor.

7 THE COURT: Hold on. You fellows might agree,
8 but I don't.

9 MR. FISHER: In fact, we are willing to have
10 Judge Leffowitz without the other witness, your Honor.

11 THE COURT: No, no. It is not even an
12 election year.

13 MR. POLLAK: It certainly is, Judge.

14 THE COURT: No, no. All right. Let
15 us stop.

16 MR. RICHMAN: Your Honor, this should not
17 be done in the spirit of levity.

18 THE COURT: I am not doing it in the spirit
19 of levity. You are doing it in the spirit of attempting
20 to cause something as a cause celebre out of something
21 which happened which has nothing to do with this trial.

22 MR. RICHMAN: I don't accept that, your
23 Honor.

24 THE COURT: I don't care whether you accept
25 it or not.

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2 We are not going to have any -- I understand
3 you made a statement. That is fine. That does not
4 have any effect whatsoever on this case.

5 As to the other things which you claim in
6 some way intimidated witness. I haven't seen any in-
7 timidation of witnesses. You called all the ones,
8 apparently, that you wanted, you rested. and that is all
9 there is to it.

10 This is not going to be a situation where you
11 are going to have your cake and eat it too. The
12 fellow was here. If he broke some rule of the attorney
13 general's, that is up to the attorney general. I
14 couldn't care less. He testified.

15 I understand that there is going to be a re-
16 argument in connection or a request for reargument which
17 I said I would listen to in connection with the testimony
18 of one of the witnesses that I have not permitted on this
19 point, and that affects, I guess, you, Mr. Warner.

20 Let us hear it.

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MR. PHILLIPS: Your Honor, I can't add a lot to what I said this morning, but it seems clear that the testimony of Mr. Tognino to the effect that the defendant Ceriale went by the nickname of Joe Dean and spent a considerable amount of time at Mr. Tognino's barbershop at 320 Pleasant Avenue, the same barbershop that Mr. Stasi was referring to, is relevant in this case because it corroborates what Mr. Stasi said. It is relevant both as rebuttal testimony to the defense witnesses produced by the defendant Ceriale to the effect that Mr. Ceriale was a hard worker and worked very diligently and, in fact, that is what one of the witnesses testified to, that he was a very hard worker. We submit this would rebut that much of the defendant Ceriale's case.

In addition to which, we would ask leave of the Court to permit the government to produce this evidence as part of its direct case, particularly in view of the fact of Mr. Warner's statement to the jury that Ceriale would be on the witness stand before the jury, in other words, would testify.

There is a long line of cases which hold that it is permissible for the Court to permit the government to introduce as rebuttal testimony evidence which would be proper in its direct case. Here this is even a

1 tp2

2 different situation where the defense counsel represented
3 to the Court, to the jury and to the government that his
4 client was going to take the witness stand, and I would
5 point to the authority of Judge Frankel in United States
6 v. Sweig where Sweig's attorney stated that his client
7 was going to take the witness stand and when he didn't the
8 government was permitted by Judge Frankel to introduce two
9 full days of testimony after it had rested its case.

10 THE COURT: Mr. Warner?

11 MR. WARNER: Your Honor, I will answer that if
12 your Honor feels it is necessary, but I seem to have heard
13 the same arguments I heard from Mr. Phillips at the side
14 bar.

15 If your Honor feels the same way, then I will
16 sit down.

17 THE COURT: Go ahead, sit down.

18 The entire defense case, from what I gather,
19 is not only to say that this man was a hard-working man,
20 but also that he was not known as Joe Red. In effect,
21 to now come up with a new nickname that he was known as
22 Joe D or Dean, whatever it is, is not going to in any way
23 rebut the defense case.

24 To reopen the case to put it in now, to the
25 best of my knowledge, is not going to help the government's
case. The fact that the man might have spent an awful

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2 lot of time in a barbershop in no way contradicts the fact
3 that a shift worker was a hard worker on a shift and when
4 he was off his shift he could have spent time at the
5 barbershop, at the pool hall or any place he pleased.
6

7 Under the circumstances, I don't feel it is
8 either proper rebuttal or of such probative value that I
9 should permit the government to reopen its case.

10 I understand you have one more rebuttal
11 witness, is that correct?

12 MR. PHILLIPS: We have two exhibits that we want
13 to show to the jury, your Honor, pursuant to a stipulation
14 Mr. Pollak and I have entered into that Government's
15 Exhibit 107 refers to the year 1972.

16 THE COURT: The only reason I didn't let you
17 show it before was I hoped that you could clean up the
18 back of it.

19 MR. PHILLIPS: I will, if I can have a black pen
20 from the clerk.

21 THE COURT: Make sure all writing on the back
22 of that is covered.

23 MR. POLLAK: Might I make a suggestion as to the
24 back?

25 I would have no objection to the government substituting a Xerox copy of the front of that and that way

1 tp4

2 we won't have to have the back and have arguments as to
3 whether it is totally obliterated or not.

4 THE COURT: I don't really care. If you have
5 a handy Xerox machine, fine. Unfortunately, unlike the
6 advertisements, we don't have one that rolls from court-
7 room to courtroom.

8 MR. PHILLIPS: I think the jury is entitled to
9 see the original and I don't see any problem in crossing
10 what is on the back out.

11 MR. POLLAK: May I see the back?

12 MR. PHILLIPS: The word "Salley" was put on the
13 top here. That is not the agent's marking. The agent's
14 marking is down below. I will point it out to Mr. Pollak.

15 THE COURT: Go ahead.

16 MR. POLLAK: I submit there is some question
17 as to -- I don't know and my recollection is that the
18 witness was not shown the back at all, so I would assume
19 that he did not see it, so I would ask that the entire
20 back --

21 THE COURT: Is it just as easy to cross all the
22 writing out on the back? Why don't you do that.

23 Other than that, do we have a witness to call?
24 Mr. Curran, do you have a witness to call?

25 MR. CURRAN: Yes, your Honor.

1 MR. PHILLIPS: Before we call the witness, I
2 would like to show this to the jury first.

3 THE COURT: All right, get it done.

4 MR. CURLEY: Judge Duffy, at the break I have
5 two matters before Judge Tyler. I may not be in court when
6 court resumes. Mr. Richman will cover for me.

7 THE COURT: I firmly suspect, Mr. Curley, that
8 we are going to be through by any break. However, I assume
9 you have not given up on the former motion you have sub-
10 mitted.

11 MR. CURLEY: No, certainly not. I thought that
12 may be done on Monday rather than today.

13 THE COURT: Why not today?

14 How long do you figure you will be before Judge
15 Tyler?

16 MR. CURLEY: That is a sentence calendar and
17 I have three of twelve cases. One case will be very
18 brief. I have other people from my office who will be
19 there on other matters.

20 THE COURT: All right.

21 (Jury present.)

22 THE COURT: Ladies and gentlemen, when we broke
23 this morning certain exhibits had just been received in
24 evidence. The government would now like you to take a look
25 at those.

1 tp6

2 Go ahead, Mr. Phillips, hand them to the jury.

3 MR. PHILLIPS: Your Honor, it has been stipulated,
4 first, between the government and defense counsel that
5 Government's Exhibit 107 now in evidence relates to the
6 year 1972.

7 I would like to show the jury Government's
8 Exhibits 107 and 108 in evidence and also 105 in evidence,
9 which they did not see yesterday.

10 THE COURT: Let me see Government's Exhibit 105
11 before you show it to the jury.

12 MR. PHILLIPS: Yes, your Honor (handing).

13 (Pause.)

14 THE COURT: All right.

15 MR. POLLAK: Since the jury is going to be
16 seeing exhibits, your Honor, I recall yesterday, also,
17 that I asked for permission to have them see Exhibit A.

18 THE COURT: Yes, let them see it.

19 MR. PHILLIPS: Your Honor, may Mr. Rosenberg
20 and I approach the bench?

21 THE COURT: Yes.

22 (At the side bar.)

23 MR. PHILLIPS: I just want to make sure it is
24 on the record.

25 I don't know whether we finally disposed of our

1 tp7

2 offer of Government's Exhibit 3574 and Mr. Rosenberg's
3 request for a Wade hearing.

4 MR. ROSENBERG: I indicated to Mr. Phillips
5 in the event no additional testimony comes in --

6 THE COURT: That is what you said this morning.

7 MR. ROSENBERG: In other words, the offer of
8 the government exhibit, I object to it as heretofore
9 and this Court granted my objection.

10 If you don't reverse yourself, then I am going
11 to rest with respect to the Wade hearing. If you do
12 reverse yourself --

13 THE COURT: You mean to say you are going to
14 withdraw your request?

15 MR. ROSENBERG: Yes.

16 THE COURT: I am not too difficult or too
17 stubborn, I hope, but there are rare cases when I reverse
18 myself. This is not one of them.

19 I recognize the government had an interest in
20 putting in that exhibit, but I did not permit it at the
21 beginning and I have no intention of reversing myself.

22 MR. ROSENBERG: All right. Then I will rest
23 with respect to the Wade hearing.

24 THE COURT: You are withdrawing your request?

25 MR. ROSENBERG: I am withdrawing my request

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2 with respect to the Wade hearing.

3 THE COURT: All right.

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(In open court.)3
(Pause.)4
THE COURT: All right, Mr. Curran. Call your
5 next witness.6
MR. CURRAN: The government calls Arnold G.
7 Vismale.8
A R N O L D G. V I S M A L E, called as a witness
9 on behalf of the government, in rebuttal,
10 being first duly sworn, testified as follows:11
THE COURT: You may inquire.12
MR. CURRAN: Thank you, your Honor.13
MR. RICHMAN: Your Honor, may I have a side
14 bar on this?15
THE COURT: If you insist, sure.16
(At the side bar.)17
MR. RICHMAN: Your Honor, this is a man from the
18 Department of Motor Vehicles.19
THE COURT: I don't know where he is from.20
MR. RICHMAN: It says on his shoulder "Department
21 of Motor Vehicles."22
THE COURT: I couldn't see.23
MR. RICHMAN: Apparently this is with reference
24 to the car situation with Mr. Tolopka.25
I made my references concerning the nature of

1 hp2

2 this, the permissibility of this evidence yesterday in
3 your chambers. I believe if anything this is evidence of
4 another crime which has no probative value in this
5 particular case.
6

7 Mr. Tolopka has not been charged with any
8 crime and possession of stolen property in and of itself
9 is no indication of character under any circumstances
10 without knowledge of the defendant himself or the person
11 himself. There has been no showing of knowledge and
12 should there be an attempt to show knowledge, of course,
13 it would be another case entirely.

14 THE COURT: I have no idea what this man is
15 going to testify to.

16 MR. CURRAN: Your Honor, may I be heard briefly.

17 THE COURT: Yes.

18 MR. CURRAN: First, for the record, I would
19 suggest that possession of stolen property might go to
20 character, but that is not the point here.

21 I have no intention of eliciting from this witness
22 any testimony about a stolen vehicle.

23 THE COURT: You don't?

24 MR. CURRAN: I do not. It's pure rebuttal
25 testimony.

THE COURT: All right. Let's go.

1 hp3

Vismale-direct

2 (In open court.)

3 DIRECT EXAMINATION

4 BY MR. CURRAN:

5 Q Mr. Vismale, by whom are you employed?

6 A By the New York State Department of Motor
7 Vehicles, Bronx District office, 2265 East Tremont Avenue,
8 in the Bronx.

9 Q For about how long, sir, have you been so
10 employed?

11 A 13-1/2 years.

12 Q Will you please tell us your present position
13 with that office?

14 A I am a Motor Vehicle license examiner.

15 Q Mr. Vismale, or Inspector Vismale, in connection
16 with your duties as a Motor Vehicle license examiner is
17 one of those duties the maintaining of records with respect
18 to used car dealerships and the names of used car dealers?

19 A Yes, it is.

20 Q And these records are maintained under your
21 supervision, among other people?

22 A Among other people and myself, yes.

23 Q Are these records required by law to be main-
24 tained in Bronx County?

25 A Yes, they are.

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Vismale-direct

4424

2 Q Inspector Vismale, did you pursuant to a
3 subpoena request of the government examine the records
4 on file in your office for the year 1970 with respect to
5 a used car dealership called Fair Motors, F-a-i-r Motors?
6 Yes or no.

7 A Yes, I did make an inspection of the records.

8 MR. FISHER: If your Honor please, on behalf
9 of the defendant Christiano I would respectfully ask the
10 Court for a limiting instruction.

11 THE COURT: I don't know where the testimony
12 is going yet.

13 MR. FISHER: He said Fair Auto.

14 MR. CURRAN: Fair Motors, your Honor.

15 THE COURT: Apparently, from where I understand
16 this testimony is going, it has nothing whatever to do
17 with any of the defendants on trial except perhaps for one
18 and it is not to be considered as to any of the other
19 defendants on trial. You understand that?

20 All right. Go ahead.

21 BY MR. CURRAN:

22 Q I think you testified, Inspector, that you did
23 make such an inspection of the records?

24 A Yes, I did.

25 Q Did you find the name of any used car dealership

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Vismale-direct

4425

2 listed by the name Fair Motors for the year 1970 in Bronx
3 County?

4 A No, there is no such dealer under our records
5 of the name of Fair Motors.

6 Q That is for the year 1970?

7 A For the year 1970.

8 Q Or any time thereafter?

9 A Any time thereafter.

10 Q I believe you testified, Inspector, that dealers
11 or principals are also required to register with your office,
12 is that correct?

13 A Yes, it is.

14 Q Did you search at the request of the government
15 pursuant to subpoena for the name of a Mr. Fair, F-a-i-r,
16 or even F-a-r-e, for this same period?

17 A Yes, I did, I did search the records for 1970
18 for the name Fair.

19 Q Did you find any such Mr. Fair registered as a
20 dealer?

21 A No, I did not.

22 MR. CURRAN: Your Honor, I have one additional
23 question of this witness, but in light of the last side bar
24 might I approach the bench.

25 THE COURT: Sure.

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Vismale-direct

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(At the side bar.)

MR. CURRAN: Your Honor, so that there can be no possible question of misleading, I said before that I had no intention of eliciting anything about a stolen vehicle. I just want to make triply sure that there was no misunderstanding either with your Honor or with Mr. Richman.

What I do intend to elicit from this witness now is that he has checked the records of P & J, which is the other company mentioned by Mr. Tolopka, the company he said he bought the Cadillac from in October or November of 1970, and that there is no record of a sale of a Cadillac to Mr. Tolopka.

MR. RICHMAN: He has checked the records?

MR. CURRAN: Yes.

1 jhal
2 MR. RICHMAN: That is not true, Mr. Curran.
3 Shall I tell you why? P & J is owned by Peter Lepore,
4 who you had in your office yesterday, and you didn't
5 check any records, you took his word alone.

6 MR. CURRAN: Mr. Richman is now telling me
7 what this witness knows.

8 Under law all such sales have to be reported --

9 THE COURT: All sales of used cars?

10 MR. CURRAN: All sales by a used car dealer
11 must be reported to the Bronx office. He has gone
12 through all the P & J used car sales in the year 1970
13 and he is prepared to testify under oath that there is no
14 record of a P & J sale to a Benjamin Tolopka of any kind
15 of car.

16 That is all I am saying, Mr. Richman.

17 MR. RICHMAN: But neither he nor you checked
18 Mr. LePore's records yourself.

19 MR. CURRAN: I have checked the official
20 records, your Honor, and this is the official custodian.
21 That is the testimony.

22 There will be no reference to any stolen
23 vehicle. This is pure rebuttal as to what Mr. Tolopka
24 said.

25 THE COURT: All right.

MR. RICHMAN: I will raise my objection at the proper time, your Honor.

(In open court.)

BY MR. CURRAN:

Q Mr. Vismale, are reports required to be made by used car dealers, licensed used car dealers, of all sales to your office?

A Yes, they are. The dealer is required upon the sale or transfer of a vehicle under his control to issue a document known as an MV-50, certificate of sale, the original copy to be given to the purchaser, the remaining duplicates to be forwarded to the Bronx district office, or whatever office that may control that dealer.

Q But your office would cover sales in the Bronx?

A Yes, sir.

Q Mr. Vismale, did you pursuant to subpoena request of the government examine the MV-50s as to all sales by P & J Auto Sales in the year 1970?

A Yes, I did.

Q Did you find any record of a car, Cadillac or otherwise, being sold by P & J to a man named Benjamin Tolopka?

A There is no listing for that name in our records.

1 jha Vismale-direct-cross 4429

2 MR. CURRAN: No further questions, your
3 Honor.

4 THE COURT: All right.

5 CROSS EXAMINATION

6 BY MR. RICHMAN:

7 Q Sir, who are the principals of P & J Motors?

8 A I did not take down the name.

9 Q It is a partnership, isn't it?

10 A I think it is a d/b/a, sir.

11 Q So it is a partnership, a d/b/a is a partner-
12 ship?

13 A I wasn't requested to check the principals out,
14 so I didn't check them out, sir.

15 THE COURT: Wait a second. You two fellows
16 know what d/b/a is.

17 MR. RICHMAN: Doing business as, sir.

18 THE COURT: Doing business as.

19 Q That is generally one or more persons who are
20 not incorporated who may be doing business under assumed
21 names?

22 A I could check the form and make sure.

23 Q Please.

24 A I won't have the principal, but I will have
25 whether it is a corporation or not.

1 jha

Vismale-cross

4430

2 THE COURT: Do you have the form here?
3 Go ahead and look.

4 A It's a b/d/a.

5 Q In other words, it is not a corporation, it
6 is individuals?

7 A That's right, sir.

8 Q Did you check the names of the individuals of
9 P & J?

10 A No, I did not at this point.

11 Q Then you wouldn't know if the individuals in
12 P & J may have sold the car and recorded the sale under
13 their name, is that correct?

14 A As a dealer he would be required -- as a
15 dealer he would be required by law to issue an MV-50,
16 certificate of sale.

17 Q Yes. The certificate of sale would have
18 necessarily been filed under his own name if he didn't do
19 it under the d/b/a name?

20 A Then his name would have to show on the certi-
21 ficate of sale as being sold from the company to an in-
22 dividual, which would have to be him.

23 THE COURT: Let me lead a little bit, if
24 you don't mind.

25 Let me suggest to you that I am a partner in

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Visnale-cross

4431

2 a d/b/a auto sales. I have my own car and I don't
3 sell the car through the auto dealership, I sell it
4 individually to somebody else. Do I have to file one
5 of these MV-50s?

6 THE WITNESS: Yes, sir.

7 Q Do you have to put the name of the corporation
8 or the d/b/a on it?

9 A Yes. You would have to put the name of the
10 company and to whom you sold it.

11 Q Are you suggesting that if I had a car myself,
12 as the court indicated to you, and wanted to sell it to
13 Mr. Curran I would have to put the name of the company
14 which I am a principal of?

15 MR. CURRAN: I object to that, your Honor.
16 That is not what he suggested at all. He is
17 testifying about used car dealers.

18 THE COURT: I understand that. Let me cut
19 it down.

20 Does this apply to individuals other than used
21 car dealers.

22 THE WITNESS: What are we talking about, sir?

23 THE COURT: The MV-50.

24 THE WITNESS: A dealer, if he had transferred
25 a car under his control and registered as a property of

1 jha Vismale-cross 4432
2 the dealer, any time he transfers that vehicle he must use
3 an MV-50.
4 THE COURT: All right. Let's take it one
5 step farther. Is an individual selling a used car
6 to somebody required to file an MV-50?
7 THE WITNESS: Individual owner who is not a
8 dealer?
9 THE COURT: That's right.
10 THE WITNESS: May transfer the car if it is
11 previous to 1973 on the registration.
12 THE COURT: Without filing an MV-50, right?
13 THE WITNESS: Yes, sir.
14 MR. RICHMAN: No further questions.
15 THE COURT: All right.
16 MR. ELLIS: I have a few questions, if I
17 may.
18 THE COURT: Sure.
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CROSS EXAMINATION

BY MR. ELLIS:

Q Mr. Vismale, could you tell us the procedure you followed in making this search?

MR. CURRAN: Which search are we talking about now, your Honor?

THE COURT: We have three of them.

MR. CURRAN: That's correct.

MR. ELLIS: Let me see if I can narrow it down for a little bit.

Q The search for Fair Motors.

A Yes, sir. We keep a record of all dealers who are licensed in our district. We have them filed in the Inspectors Unit. We have another section, the Dealers and Auto School Units, where we keep a master file.

I went through both files this morning. We do not have a Fair Motors registered in the Bronx.

Q What is your district?

A The Bronx district, sir, the Bronx Borough, the Borough of the Bronx.

Q Did you find registered in your agency a Jimmy's Used Car Lot?

A We are talking about another dealer. Yes,

1 gta Vismale-cross 4434

2 there is a Jimmy's Used Car Lot registered in our
3 office.

4 Q And was Jimmy's Used Car Lot registered in
5 1970 or 1971.

6 A I believe they were, sir.

7 Q Do you know?

8 A I do not know for sure.

9 Q Did you come across the name John Barnaba
10 registered in your agency?

11 A I did not check that name, sir. We have
12 thousands of names.

13 Q In the course of your exhaustive search
14 did you come across the name John Barnaba, if you recall,
15 sir.

16 A No, sir, I don't recall.

17 Q Thank you.

18 MR. ELLIS: No further questions.

19 THE COURT: Does anybody else want to inquire?

20 All right, Mr. Vismale. Thank you very much.
21 Step down, please.

22 (Witness excused.)

23 THE COURT: Any other witnesses ?

24 MR. CURRAN: Your Honor, the government
25 rests its rebuttal case.

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THE COURT: All right.

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Is there any surrebuttal?

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I guess both sides rest.

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Ladies and gentlemen, please. Now that we are finished with the evidentiary part of the case, don't start deliberating even inside your own head. Keep an open mind. Please keep an open mind.

There are a number of other things which are going to happen which need to happen for you to intelligently deliberate about this case.

You are going to hear the summations, the closing arguments of both sides. Those are intended to help you in your deliberations. They set forth the contentions of the various parties.

You are also going to hear a charge from me. In that charge I am going to tell you what the law is. Only after you hear that, only after I give you the go-ahead signal, should you start to deliberate.

Please keep an absolutely open mind.

We are going to start summations at 9:45 on Monday.

Mr. Marshal, will you escort the jury from the room, please. Everybody else remain seated.

(The jury left the courtroom.)

1 gta
2 THE COURT: All right, gentlemen. I under-
3 stand the order of defense summation will be the reverse
4 order of the indictment -- I think there is one switch --
5 subject to future switches. The only thing is I want
6 you to tell me before you do it so I don't call on one man
7 and someone else stands up. Not only do I look silly,
8 you look even worse.

9 Mr. Lopez was good enough to give me a copy
10 of the order of the defense summation. Mr. Pollak, you
11 start off at 9:45 on Monday morning.

12 I am suggesting to all counsel that you
13 confine yourselves to the record. All right? I don't
14 want incorrect statements, because I don't want to
15 admonish you in any way.

16 By the way, I have been hopefully relatively
17 patient during this trial, or I tried to be, and I hope
18 that my patience is not tried in summation.

19 I believe summations are argument. You are
20 advocates. But I don't believe that it should pass the
21 realm of reality.

22 I would assume that everybody here wants to make
23 a motion for a judgment of acquittal based upon the entire
24 case. Is that correct?

25 MR. LEIGHTON: Yes, your Honor.

1 gta

4437

2 MR. PANZER: Yes.

3 MR. FISHER: Yes, your Honor.

4 MRS. ROSNER: Yes.

5 THE COURT: Does everybody want to argue it?

6 MR. SIEGAL: Yes, sir.

7 THE COURT: I know you do, Mr. Siegal and
8 I know Mr. Curley does.

9 All right.

10 MR. SIEGAL: Excuse me, your Honor. May
11 I approach the bench for one second off the record?

12 THE COURT: All right.

13 Mr. Siegal, you want to. Let me see who else
14 does.

15 Mr. Rosenbaum, you said you wanted to?

16 MR. ROSENBAUM: Yes, please, your Honor.
17 Very short, your Honor.

18 THE COURT: Mr. Sunden?

19 MR. SUNDEN: Brief argument.

20 THE COURT: Mrs. Rosner?

21 MRS. ROSNER: No, your Honor. Thank you.
22 Your Honor, for the record, we make a motion,
23 but without argument.

24 THE COURT: Absolutely. For the record,
25 you have made a brilliant argument.

1 gta
2 Actually, I don't know whether you people
3 recognize what I am doing here.

4 MRS. ROSNER: I do, your Honor, and I
5 appreciate it.

6 THE COURT: Maybe some of the other people
7 don't. By me saying this I am not putting anyone down.
8 If you stand up and argue you are stuck in the Court of
9 Appeals with what you argue. If I say you have made a
10 brilliant argument and two months from now you come up
11 with something that you would never have thought of, that
12 goes up to the Court of Appeals as part of your brilliant
13 argument. That is why I am saying that.

14 All right, continuing down: Mr. Fisher?

15 MR. FISHER: No argument, your Honor.
16 Another brilliant one.

17 THE COURT: All right. Mr. Ellis?

18 MR. ELLIS: I will argue briefly, your
19 Honor.

20 THE COURT: Mr. Rosenberg?

21 MR. ROSENBERG: I will rest on the lack of
22 evidence in the case, your Honor.

23 THE COURT: Mr. Warner?

24 MR. WARNER: I am staying with the presump-
25 tion of brilliance, your Honor.

2 THE COURT: Mr. Richman?

3 MR. RICHMAN: In addition to the argument
4 already given, your Honor, I will make a brief one my-
5 self.

6 THE COURT: Mr. Curley?

7 MR. CURLEY: Yes.

8 THE COURT: Mr. Dowd?

9 MR. DOWD: I think I have done well enough,
10 Judge.

11 THE COURT: All right. Mr. Panzer?

12 MR. PANZER: No argument, your Honor.

13 THE COURT: Mr. Martin J. Siegel?

14 MR. SIEGEL: No argument, your Honor.

15 THE COURT: Mr. Harry Pollak?

16 MR. POLLAK: No argument.

17 THE COURT: Mr. Leonard King?

18 MR. KING: Yes.

19 MR. LEIGHTON: Your Honor?

20 THE COURT: I am sorry, Mr. Leighton.

21 I don't know how I did that. Any argument?

22 MR. LEIGHTON: No argument.

23 THE COURT: Those that don't want to argue,
24 I will see you back here at 9:45 on Monday morning.

25 MR. WARNER: May I ask one thing before we

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leave?

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I understood your Honor was going to make a determination as to the contentions for the preparations of the surmation.

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THE COURT: Yes. I guess I have to do that. Unfortunately, I will take the weekend to do it. I will do it at 9:45 on Monday morning.

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MR. WARNER: Your Honor, I will take care of this with Mr. Pollak.

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THE COURT: All right. Those who aren't going to argue, why don't you go back to your offices.

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MR. SUNDEN: Judge --

THE COURT: You can stay if you want to.

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MR. SUNDEN: I am going to withdraw any oral argument.

17

THE COURT: All right.

18

(Recess.)

19

(In open court; jury not present.)

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THE COURT: All right, Mr. Siegal.

21

MR. LOPEZ: He is not here.

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THE COURT: Mr. Rosenbaum.

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MR. ROSENBAUM: If your Honor please, I would like to address myself initially to count 13 of the indictment, in which it alleges in or about the

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2 month of November, 1972, in the Southern District of
3 New York, George Toutoian and Vincent Rizzo, the defend-
4 ants, unlawfully, wilfully and knowingly did
5 distribute and possess with intent to distribute a
6 Schedule I narcotic drug controlled substance, to wit,
7 approximately one-quarter kilogram of heroin.

8 If it please the court, Mr. Stasi testified on
9 page 675 of the trial transcript when he was questioned
10 I believe by Mrs. Rosner on cross examination or Mr. Fisher:

11 "Q It is a fact, is it not, Mr. Stasi, that
12 George Toutoian had nothing whatsoever to do with Louis
13 Inglese, isn't that right?"

14 The answer was:

15 "As far as I know, yes.

16 "Q And Mr. Inglese had no idea you were deal-
17 ing with George Toutoian, isn't that right?

18 "A That's correct."

19 If your Honor please, the testimony fo Mr.
20 Stasi in substance stated after he left, I believe it was,
21 the Log Cabin in November, 1972 and made the alleged pur-
22 chase of the heroin he proceeded down to Mr. Rizzo's
23 apartment and proceeded to sell to him part of that
24 alleged purchase for \$7000. By Mr. Stasi's own statement,
25 your Honor, he excludes himself from any relationship with

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the rest of the alleged conspirators in this matter and that had nothing to do with Mr. Inglese, who allegedly was the source of the heroin in the conspiracy, but not with reference to Mr. Rizzo.

In view of that, your Honor, I respectfully request with regard to count 13, your Honor, that it is a totally different conspiracy, if any were involved, than the one on trial here.

With respect to the other count, your Honor, the conspiracy itself, page 697 says:

"And isn't it a fact that Mr. Inglese had nothing to do with your purchasing that cocaine from Jack Spada?"

"A That's right."

I believe, your Honor, this is the same cocaine which was allegedly sold to my client, Mr. D'Amico, and has nothing again to do with the alleged conspiracy in this indictment.

That in addition to all the other brilliant arguments by co-counsel, that is all I have to say at this time.

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2 THE COURT: All right, Mr. Rosenbaum.

3 You might as well respond right now.

4 MR. CURRAN: May Mr. Phillips respond?

5 THE COURT: Yes.

6 MR. PHILLIPS: Your Honor, I thought I heard,
7 I may have heard wrong, did Mr. Rosenbaum say Count 13?

8 MR. ROSENBAUM: Yes, I said Count 13.

9 THE COURT: That is what I have in my notes.

10 MR. PHILLIPS: Count 13, according to a copy of the
11 indictment that I have, charges Inglese, Delvecchio and
12 Christiano with possession with intent, or under the old law,
13 in November, 1970.

14 I think the count Mr. Rosenbaum is referring to
15 is Count 25.

16 MR. ROSENBAUM: Your Honor, I have read you the
17 old indictment, your Honor.

18 THE COURT: But it is Count 25?

19 MR. ROSENBAUM: Count 25 is the same.

20 MR. PHILLIPS: Your Honor, this is not a
21 conspiracy count, this is --

22 THE COURT: It is a substantive count.

23 MR. PHILLIPS: It charges Mr. D'Amico and Mr.
24 Toutoian with possessing with intent to distribute a quantity
25 of narcotics, the same quantity as described by Mr. Stasi

1 tp2

2 in his direct examination.

3 As the bill of particulars indicates, Mr.
4 Toutoian was the one who aided and abetted the possession
5 by Mr. D'Amico by delivering to Mr. Stasi, who, in turn,
6 delivered to Mr. D'Amico, so regardless whether or not the
7 particular distribution was done within the scope of the
8 conspiracy as charged in Count 1, this is still a substantive
9 count different and apart from the other substantive counts
10 and we see no prejudicial joinder of Count 25 with the
11 conspiracy or any of the other counts, so we would oppose
12 for those reasons that there be a directed verdict of
13 acquittal or a severance with respect to Mr. D'Amico on
14 that particular count.

15 The testimony is unequivocal from Mr. Stasi
16 and has not been rebutted that a quarter of a kilogram of
17 heroin was possessed by Mr. Rizzo and Mr. D'Amico with
18 intent to distribute. The intent to distribute, of course,
19 is shown by the fact that the price, the amount and the
20 fact that Ralph Burdee, his alleged partner, was brought
21 over and they discussed ultimate distribution of the
22 narcotic.

23 THE COURT: All right. I will reserve.
24

25 Mr. Siegal?

MR. ROSENBAUM: Your Honor, I also made reference

1 tp3

2 to the substantive count with reference to the cocaine.

3 THE COURT: Yes.

4 MR. ROSENBAUM: I don't know if Mr. Phillips intends
5 to answer that.

6 THE COURT: No. I heard enough. I am
7 reserving.

8 All right, Mr. Siegal.

9 MR. SIEGAL: If your Honor please, I first want
10 to move to strike -- to move either to strike or to strike
11 Overt Act No. 2, "In or about August, 1970, defendant
12 Benjamin Tolopka received a quantity of cocaine," upon
13 the ground that it being a cocaine case the government was
14 under a burden of proving that the defendant knew that the
15 cocaine was imported.

16 With respect to Count 15, Overt Act 15, "In
17 or about January, 1973, defendants Carmine Tramunti and
18 Louis Inglese had a conversation in Lo Piceolo, Westchester
19 Avenue, Bronx, New York," and in the bill of particulars
20 that was spread out a little bit to say that Inglese was
21 to obtain the money from Tramunti.

22 The sense of that overt act is that that was
23 the conversation wherein Tramunti agreed to become a
24 partner in this business, and I submit most respectfully,
25 if your Honor please, that if that is the agreement,

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2 it also cannot be the overt act.

3 I say, if your Honor please, most respectfully,
4 the function of an overt act in a conspiracy prosecution
5 is simply to manifest that the conspiracy is at work and
6 is neither a project still resting solely in the minds of
7 the conspirators nor a fully completed operation, and I
8 cite most respectfully *Yates v. U.S.* at 354 Fed. 2d 298.

9 There isn't any question, as I see the evidence
10 and the attempt to bring in Tramunti by reason of that
11 conversation at the Lo Piccolo, that this is the time
12 that they are saying that he agreed that he became a
13 partner, not that he was or that this was something in
14 furtherance of a pre-existing conspiracy. Therefore,
15 I submit that this act, this conversation at the Lo Piccolo,
16 could not both be the agreement and the overt act pursuant
17 to the --

18 Now, if your Honor pleases, with respect to
19 the 16th overt act, which reads, "On or about May 30,
20 1973, defendant Vincent D'Amico went to the Centaur
21 Restaurant," and in the bill of particulars it says to
22 purchase cocaine from Stasi, I submit most respectfully,
23 this has nothing to do with this conspiracy. This was
24 to purchase cocaine from Stasi and that, as far as I can
25 recall the testimony, had something to do with a man named

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2 Spada, or something like that, and he has not been con-
3 nected to this conspiracy nohow.

4 I also most respectfully move to dismiss the
5 17th overt act "On or about May 30, 1973, defendant
6 Thomas Lentini delivered a quantity of cocaine to defendant
7 Dominick Lessa. That did not come from Inglese or any
8 part of this conspiracy and I submit that those overt
9 acts should be dismissed.

10 Now, if your Honor please, with respect to
11 Count 1, the conspiracy, as far as the defendant Tramunti
12 is concerned, I most respectfully submit that there is noth-
13 ing in the non-hearsay testimony or the independent testi-
14 mony of Tramunti, in other words, the words out of his
15 mouth or the activities by Tramunti, that shows that
16 unequivocally he agreed to become a member of the con-
17 spiracy, that he joined the conspiracy and that he had a
18 stake in this conspiracy.

19 All we have in the unequivocal part of the
20 testimony, so to speak, if you want to cut it up that way,
21 or the non-hearsay, is that Stasi said that he overheard
22 a conversation wherein Inglese said to him, "I expect some
23 goods, I'll need some money or I want some money," and
24 Tramunti didn't answer, shook his head and moved his
25 arms. That certainly, at best, is equivocal. What

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2 does he mean by shaking his head? He could have raised his
3 hands in a gesture as if to say, "I don't know what you
4 are talking about now," or, "See me some other time."

5 I say most respectfully in order to get Mr.
6 Tramunti in this conspiracy by reason of the independent
7 testimony, the words must be unequivocal, there must not
8 be any mistake or any question about what he means.
9 Anything else that Stasi talks about is all hearsay testi-
10 mony and the only other thing that Stasi talks about is
11 that after he supposedly came back from jail and he reported,
12 he, Stasi, reported, out of Stasi's mouth, what Inglese
13 was supposed to have said Tramunti said, "Okay," or "No,"
14 or something, at any rate, there was no participation,
15 there was no money advanced.

16 Let us take the worst of it, let us take at
17 this juncture that Inglese said, "Now, I expect to get some
18 goods, I want you to come into this partnership," because
19 according to the bill of particulars he wasn't in before,
20 so it has to start now.

21 "I want you to come into this partnership."
22 I expect some goods. I need some money."

23 Hasn't Inglese got the right, as he did here,
24 to withdraw that offer? Hasn't he a right to say two
25 weeks later, "Tell him no, I don't need any money"?

1 tp7

2 Doesn't tramunti have to do something? Doesn't he have to
3 advance the money? Doesn't he have to put some money into
4 this deal? Doesn't he have to show that he wants to be a
5 partner?

2 6 I think, if your Honor please, that U.S. v.
7 Stromberg is plain on that subject. I think U.S. v.
8 Reina and U.S. v. Cianchetti at 315 Fed. 2d 584 and our
9 Second Circuit says, "Rather than reveal a stake in the
10 conspiratorial venture or affirmative attempt to further
11 its purposes, Tramunti's statements," we use the word
12 Tramunti instead of the name there, "and conduct were
13 disclamatory in nature."

14 We say that knowledge must be clear and not
15 equivocal. We say there may be circumstances in which
16 the evidence of knowledge is clear, yet the further step
17 of finding the required intent cannot be taken.

18 We submit that association is not sufficient,
19 we submit that association plus knowledge is not sufficient.

20 I can be standing in a restaurant and I can know
21 a lot of people around me are contemplating all kinds of
22 crimes so I have knowledge, but that doesn't mean I am
23 joining by just being present and having knowledge.

24 In this U.S. v. Reina at 242 F. 2d 202, there
25 is another theory here.

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2 Let us admit for the purpose of this argument
3 that everything that the government says, everything they
4 are trying to allege is true, what are they, in effect,
5 attempting to prove? They are attempting to prove that
6 Inglese at one time, at one time, and I repeat, at one time
7 said to Tramunti, "Look, I am expecting some goods, I may
8 need some money."

9 Let us say Tramunti takes out of his pocket a
10 \$5 bill and gives it to him and says, "Here is the money."
11 What has Tramunti done? Tramunti has given him a loan.
12 He has aided and abetted the purchase of narcotics on one
13 transaction, and I submit under the theory espoused in the
14 Second Circuit, a single transaction is not sufficient to
15 bring Tramunti within the ambit of this conspiracy, and I
16 submit most respectfully, upon all of the grounds set forth
17 on all of the cases cited and especially on U.S. v. Taylor,
18 we are not now at the end of the government's case, we are
19 now at the end of the entire case, and certainly at the end
20 of the entire case the government must have more testimony,
21 more evidence than they had merely to uphold the prima
22 facie case. We are now ready for the trial judge to
23 submit the case to the jury and at that time there must be
24 more evidence before the judge before he says to this jury,
25 "Go ahead and toss a coin and see which way it goes."

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3 There must be evidence from which the jury can
4 actually infer joinder and participation and not merely
5 guess or conjecture.

6 In other words, the evidence in this case depends
7 upon the interpretation of one word out of five thousand
8 papers, and that is whether or not Stasi used the word
9 "goods" and whether or not Tramunti acknowledged it,
10 acknowledged he knew what it meant when the record says
11 just the opposite, because in cross-examination Stasi said
12 specifically that Tramunti never used the word "goods" to
13 mean narcotics.

14 With all of that in this record, I say to your
15 Honor that this record is barren, it is not sufficient unless
16 your Honor wants to submit a gamble to this jury, and I
17 submit most respectfully in view of the high penalties that
18 are attendant to this crime, this is not a speeding case
19 or spitting on the sidewalk, that your Honor should be and
20 I know you will be very careful in this case before submit-
21 ting a naked case of this kind to this jury, and I ask
22 your Honor most respectfully to dismiss or find a judgment
23 of acquittal for the defendant Tramunti.
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2 THE COURT: All right. Do you want to respond?

3 MR. CURRAN: Briefly, your Honor, I would like
4 to respond to Mr. Siegal's argument with respect to the
5 facts. I would just recite them.

6 I think that before doing that the evidence,
7 circumstantial and direct, that is required to connect the
8 defendant, as I understand the law, to this conspiracy,
9 that is, the so-called independent evidence of his own
10 acts and declarations, must be established by what is called
11 a fair preponderance of the evidence, and I think that in
12 Mr. Siegal's recitation, according to Stasi's recollection,
13 he believes there may be some gaps.

14 First, there is testimony that Stasi saw
15 Tramunti at Lo Piccolo every day, part of the day and part
16 of the night. Stasi testified that he saw Tramunti and
17 Inglese taking together at Lo Piccolo.

18 By itself, your Honor, that, as Mr. Siegal has
19 indicated, establishes nothing, except that Tramunti and
20 Inglese knew each other and were apparently closely
21 associated or good friends.

22 Then one day at about 2.30 p.m. Tramunti and
23 Inglese were in conversation. Stasi testified he passed
24 them by and overheard Gigi say, "I expect some goods, I am
25 going to need some money."

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2 Now, there is testimony in the record on cross-
3 examination, I recall at least one place when asked by
4 Mrs. Rosner, Stasi said goods meant narcotics. He said
5 it in other places too in the record. And there is
6 testimony from other witnesses that goods meant narcotics.

7 Stasi testified that Carmine Tramunti nodded
8 his head and that later Inglese told Stasi, "I expected
9 some goods and I didn't get it."

10 A couple of months after that, at the Bon Soir,
11 Stasi had a conversation with the defendant Tramunti in
12 which Tramunti said that he missed the big guy and without
13 him nothing goes right, the club, there is nothing happening
14 in the club.

15 Then your Honor recalls Stasi went down to the
16 Tombs or went downtown to see the defendant Inglese, who
17 was then in jail. The next day he saw Tramunti and told
18 tramunti that Gigi said, "No." Tramunti then said, "All
19 right. I guess nothing is happening."

20 Subsequently, your Honor, there is the con-
21 versation that has been testified to about the defendant's
22 interest in getting the defendant Lentini out on bail.

23 Now, I submit, your Honor, that on that record
24 and that testimony there is more than enough evidence to
25 connect the defendant Carmine Tramunti to this conspiracy,

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2 and I am talking about independent evidence of his own acts
3 and declarations. A jury could certainly reasonably infer
4 and find that the defendant Tramunti conspired with Inglese
5 and with others and with Stasi to violate the narcotics laws
6 as charged in the indictment.

7 And for those reasons, your Honor, the govern-
8 ment submits that the motion for a judgment of acquittal
9 at the end of all the evidence should be denied.

10 MR. SIEGAL: May I just add one thing.

11 The United States Attorney says that Stasi said
12 that goods means narcotics. I don't think that is the
13 question at all. I think the question is what does
14 Tramunti understand by the word "goods," and he himself,
15 Stasi, said that at no time, no time, did Tramunti ever
16 use the word "goods" to indicate narcotics.

17 Then my friend refers to the fact that Tramunti
18 said, "I miss the big guy." Since when does missing the
19 big guy mean that you are in a conspiracy? I would be
20 in a hell of a shape if somebody would say, "I miss Siegal
21 because I haven't seen him for some time."

22 How does that put him into any kind of a con-
23 spiracy? We know from the evidence -- Mrs. Rosner brought
24 it out -- that Inglese and Tramunti had a card game,
25 Ziganet, whatever they call it, going up at Lo Piccolo,

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2 and that was the reason Tramunti was there every day.
3 Legally or illegally, whatever you call it, that was the
4 justification for his being there.

5 As far as I can read the cases, and I have read
6 them for a couple of years, I have never found that
7 association means anything. Could you believe, Judge,
8 that if this Lo Piccolo wasn't in that neighborhood where
9 they claim it was, but happened to be next to some synagogue
10 and a bunch of rabbis came in there for coffee every day
11 the charge would be that everybody is a rabbi? What kind
12 of logic is that, just because of association, just
13 because somebody comes in to have a cup of coffee, to
14 accuse him of being a part of this gigantic conspiracy?

15 I submit most respectfully, if your Honor please,
16 that your Honor should grant a judgment of acquittal.

17 THE COURT: All right. I am going to reserve.

18 All right. Mr. Ellis.

19 I am sorry. Mr. Lopez, did I cut you off?

20 MR. LOPEZ: No, you didn't. Mr. Ellis does
21 follow, but with his permission, since I am here at the
22 podium, your Honor, as far as the motion for a judgment of
23 acquittal, as far as the conspiracy count is concerned,
24 I will rely on the general motion. I will only address
25 myself to the substantive count against the defendant Di

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2 Napoli, which is framed in the indictment as Count 21.

3 That count charges, your Honor, the grand jury
4 further charges in or about the month of December, 1971,
5 in the Southern District of New York, Joseph Di Napoli
6 and Pat Delacio, the defendants, unlawfully, wilfully
7 and knowingly did distribute and possess with intent to
8 distribute a Schedule I narcotic drug controlled substance,
9 to wit, approximately two kilograms of heroin.

10 I ask that your Honor consider Count 21 in the
11 light of the bill of particulars submitted by the govern-
12 ment in this case and the proof as adduced during the course
13 of the entire trial. There is actually one kilogram of
14 heroin involved here for an approximate sale of \$22,000.

15 Now, my argument is very simple. The evidence
16 on this count was supplied entirely by Harry Pannirello.
17 There is no direct or non-hearsay evidence relating to
18 Count 21 which has been adduced against the defendant Di
19 Napoli.

20 Harry Pannirello's entire testimony is simply,
21 y ur Honor, that he heard more or less from Pat Delacio,
22 a co-conspirator in this case who didnot testify, that he
23 was going to pick up one kilogram of heroin from one Joseph
24 Di Napoli. At some time later, taking the best of Harry
25 Pannirello's testimony, he found that Pat Delacio was

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2 in possession of one kilogram of heroin.

3 Harry Pannirello testified on direct and also
4 on cross-examination that he never engaged Di Napoli in
5 any narcotic conversation, that no narcotic transaction
6 was ever conducted in his presence involving Joseph Di
7 Napoli.

8 I feel, your Honor, under the cases the very
9 simple argument that there is actually no non-hearsay
10 evidence to sustain the substantive count, Count 21, and
11 I therefore very simply ask that a judgment of acquittal
12 be granted in regards to it.

13 Thank you very much.

14 THE COURT: You want to be heard?

15 MR. PHILLIPS: Just briefly, your Honor.

16 There are two ways for sufficient evidence on
17 this count to go to the jury.

18 First of all, Mr. Lopez did not point us to any
19 principle established in the Second Circuit or elsewhere
20 which says that you cannot have sufficient proof to go to
21 a jury on hearsay evidence where a substantive count is
22 involved, and there was no objection to the testimony of
23 Harry Pannirello with respect to this particular trans-
24 action.

25 Secondly, there is sufficient evidence under the

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2 authority of United States vs. Pinkerton, a 1947 Supreme
3 Court decision which holds that once a person becomes a
4 member of a conspiracy all substantive violations are attribu-
5 table to him, even though they have have been committed by
6 other members of the conspiracy.

7 THE COURT: I will reserve.

8 Mr. Ellis.

9 MR. ELLIS: May it please the Court, at the end
10 of the entire case I renew my motion on behalf of Mamone
11 for a judgment of acquittal.

12 I submit in support of that motion, your Honor,
13 that after all of the evidence is in and after eight weeks
14 there isn't an iota of legal proof to establish that
15 Mamone in any way joined a venture to sell or distribute
16 or to give away or to barter, whatever all the other verbs
17 are that one does violate narcotics laws.

18 He is placed at one location involved in this
19 conspiracy according to the government's testimony, and
20 that is the Beach Rose Social Club. The uncontradicted
21 evidence with respect to that club was that it was a semi-
22 public place, it was a place where many people from the
23 neighborhood came to eat, to drink, to gamble. Mamone
24 was one of those.

25 There is no suggestion anywhere in this record
that he went there for any other purpose. There is no

1 testimony in this record connecting him with narcotics.
2 He wasn't even present at a time when narcotics was dis-
3 cussed, let alone dealt. There is no suggestion that he
4 possessed narcotics, that he sold narcotics, that he cut
5 or did any other thing with respect to narcotics.
6

7 There are certain acts referred to in the record.
8 The counting of the money when he was called over by
9 Inglese. I won't run through all of those acts again,
10 your Honor. I have done that at the close of the govern-
11 ment's case.

12 I do want to submit for your Honor's con-
13 sideration that the best that the jury can conclude with
14 respect to those acts is that they were in casual furtherance
15 of the conspiracy itself and do not entitle the jury to find
16 that Mamone knowingly joined in that conspiracy and had a
17 stake in its outcome.

18 I therefore ask for a judgment of acquittal.

19 MR. CURRAN: Your Honor, briefly, I submit the
20 independent or so-called independent evidence with respect
21 to Mamone clearly connects him to this conspiracy.

22 Initially, you have the testimony of Stasi to
23 the effect that he saw the defendant Mamone in the Beach
24 Rose Club three to four times a week, he saw Mamone in
25 conversation with Inglese and Delvecchio, he went to

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2 Mamone's house one time at Inglese's request and said,
3 "Gigi would like to see you," he saw Gigi Inglese huddling
4 with Mamone on numerous occasion in the club. That is
5 Stasi.

6 Then your Honor will recall the testimony of
7 Barnaba, where on one occasion the defendant Mamone
8 helped count narcotics money with Inglese in about the
9 latter part of November, 1970. This was in relation to
10 a quarter-kilogram deal and the delivery took place,
11 if your Honor recalls, later that evening at Inglese's
12 house, and my recollection of the record is there was
13 discussion of that at the time.

14 While awaiting delivery of the Forbrick --

15 THE COURT: Wait a second. Where in the record
16 is there a discussion of that?

17 MR. CURRAN: I think it is page -- can I find
18 that, your Honor?

19 THE COURT: Sure. That testimony, where it
20 counts, runs from pages 1360 on up to about 1369 or there-
21 abouts.

22 You don't have to do it now. Go ahead. If
23 there is such a thing that I have missed, tell me about it.
24 You don't have to do it right now, though, Mr. Curran.

25 MR. CURRAN: All right. If your Honor will

1 recall, there was testimony by Barnaba about a 10-day to
2 two-week period while awaiting a delivery of narcotics
3 which he had ordered on behalf of Forbrick and the
4 defendant Inglese was unable to come up with the narcotics
5 right away.
6

7 There was a conversation at one time -- I think
8 this is at pages 1368 and 1369 of the record -- where Barnaba
9 told Inglese that his customer, Forbrick, was getting
10 nervous about his money -- I am paraphrasing, your Honor --
11 and it would be helpful to Barnaba if Forbrick could meet
12 Inglese, and Inglese, as I recall the testimony, expressed
13 some reservations about that or indicated an unwillingness
14 to meet somebody like Forbrick, whom he didn't know, and
15 Mamone then vouched for Forbrick to Inglese. That is at,
16 as I said, 1368, 1369.

17 Then, your Honor, we have the situation shortly
18 after that, in about July of 1971, when Mamone overheard
19 Inglese talking about the Burke problem and Mamone said
20 he would straighten it out and a short time later Barnaba
21 met Mamone in front of the club and there is testimony,
22 indeed, there is documentary evidence -- as I recall,
23 it's Exhibits 20 and 20-A through E in evidence --
24 where they have a conversation about this and Mamone told
25 Barnaba that he had told Burke to deduct the 3000 from

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the amount owed Mamone, which was in the vicinity of twenty-five to thirty thousand, and now Barnaba would owe Mamone.

Your Honor, I submit that that evidence of Mamone's participation in the conspiracy connects him by independent evidence, by a fair preponderance of the independent evidence, to the conspiracy.

2

MR. ELLIS: May I briefly reply, your Honor?

3

THE COURT: Yes.

4

MR. ELLIS: With respect to the Stasi incidents, Stasi was very explicit. He did not know what Mamone and Inglese spoke about. There is nothing beyond pure speculation that would entitle this jury to conclude they were talking about narcotics.

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With respect to the money counting incident, no discussion about narcotics, nothing in this record that would enable the jury to infer that Mamone knew that was narcotics money. Gigi said, "Come on over here and help me count this money."

With respect to the vouching incident, the best that Mamone could possibly have overheard on this record was that there was a problem between Gigi and Forbrick about money, that Forbrick was getting restless, and Mamone said, "My wife knows his wife" or "knows the Forbricks." I remind your Honor that Barnaba was very clear. Mamone did not know Forbrick, Forbrick did not know Mamone.

It is so inherently improbable that he would bring a man that he didn't know on the basis of his wife's childhood association with the family into this major narcotics conspiracy, if he knew that it was in fact a major

1 narcotics conspiracy, that it does not rise to the dignity
2 of the evidence required to submit this to the jury.

3 Similarly, Burke, there is nothing in the Burke
4 conversation on this record at the time that Mamone heard
5 them three or four months after the problem arose between
6 Barnaba and Burke that would enable this jury to conclude
7 that Mamone knew the problem had its roots in narcotics
8 and that in settling this dispute Mamone was deliberately,
9 intentionally, knowingly adopting the purpose of the con-
10 spiracy and going forward with a view toward furthering
11 the conspiracy.

12 Your Honor, there is just no evidence in this
13 record tying Mamone to the conspiracy other than his
14 associations and I submit that that is just not enough.

15 MR. CURRAN: Your Honor, one point. I
16 think I may have not covered it and I want to make
17 sure I do. There is evidence that I should have mentioned
18 if I didn't.

19 THE COURT: You mean the conversation about
20 "Patty Dilacio told me that Mamone" --

21 MR. CURRAN: No, your Honor. Mamone told
22 Barnaba -- and this I think appears two places in the
23 record -- when Mamone overheard Barnaba telling Inglese
24 about his problem with Burke Mamone told Barnaba that Burke
25 was a customer, a customer of Mamone's. Also that

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2 appears at I think 1427 and -28, and also again on cross
3 examination at 1667 of the record, your Honor. I think
4 that is quite significant.

5 One other point which I didn't mention,
6 which is certainly I think solid circumstantial evidence,
7 at least. After Mamone undertook to take care of the
8 Burke problem for Barnaba, Barnaba -- and this was,
9 of course, a narcotics problem, as the record shows -- Bar-
10 naba never heard from Burke again.

11 MR. ELLIS: Customer for what, Judge?

12 THE COURT: I know.

13 MR. ELLIS: There is nothing in the
14 record.

15 THE COURT: Decision is reserved.

16 All right. Mr. --

17 MR. RICHMAN: I think I am next, your
18 Honor.

19 THE COURT: Yes, Mr. Richman.

20 MR. RICHMAN: Your Honor, in the matter of
21 Benjamin Tolopka we have a different set of circum-
22 stances.

23 Benjamin Tolopka is charged in the seventh count
24 of the indictment and in overt act No. 2, which more or
25 less encompasses the same alleged act.

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2 The entire case is based on the uncorroborated
3 statements of John Barnaba, which we feel we have success-
4 fully rebutted. However, there seems to be one problem
5 that the government has yet to overcome and that is to
6 establish the unlawful importation of the cocaine.

7 Your Honor indicated at the end of the
8 People's case or the government's case that he was
9 denying my application for an acquittal or a dismissal
10 based upon that issue since the government was going to
11 stipulate or introduce evidence or the court would take
12 judicial notice of certain amounts of cocaine legally
13 imported into this country but stolen. A figure was
14 mentioned briefly in chambers of approximately 4.3 kilos
15 of pure cocaine as that figure stolen in 1970.

16 The court failed to take judicial notice of
17 another fact which is alleged in the Turner case in the
18 footnotes which indicate that in the year of 1969 6.8
19 kilos were stolen and the year before that 4.4 kilos.

20 In any event, each amount, either individually
21 or cumulatively, is substantially more than the amounts
22 in this particular case with reference to Benjamin
23 Tolopka, and I address myself solely to count No. 7 in this
24 instance, where we have one-quarter of a kilo of cocaine
25 allegedly in the possession of Mr. Tolopka. This one-

quarter kilo from inference was white cocaine. Thereby we can say that this is a domestic variety or that could be a domestic variety.

We don't have the texture or the quality of the cocaine since this did not involve a seizure, whereas in Turner and the Gonzalez cases a seizure was involved.

So what do we have. We have a statement by the supposed salesman that a certain amount was delivered to Benjamin Tolopka. We don't know how badly it was cut. We don't even know if it had any more than five grains of coke. And yet, your Honor, if your Honor lets that issue go to the jury you are going to allow them to draw an inference which in law no such inference exists. I submit on that basis alone, with reference to count 7, that the count should be dismissed as against Benjamin Tolopka.

A further aspect of this case that should be brought to your Honor's attention is that this is an old law case and as an old law case it is my understanding, and I may be wrong, that there is a mandatory minimum sentence should be Tolopka be convicted. Therefore, an added burden falls upon your Honor's shoulders to determine the value of certain materials coming before the court, and in this instance we are asking the court to

act not only as a judge, but in part as a jury.

With relation to the brown material supposedly in Mr. Tolopka's possession later, I submit that that should not even be part of this conspiracy at all, since from the testimony itself that brown material, which is alleged to be cocaine and which we have shown could not have occurred, but assuming now for sake of argument that it did occur, could not be part of this conspiracy since Mr. Barnaba himself said that he did not get this from Inglese but it came from a source, from Dominick Lessa, who says it came from Mr. Papa, which would indicate that that in and of itself should be excluded from this conspiracy, since it has not been clearly shown that Mr. Papa in fact was part of this conspiracy and there has been no evidence adduced to that effect.

My last point I would like to make, your Honor, if I might, is the question of being part of a conspiracy. At what juncture does a man become a part of a conspiracy? Theoretically he should know or have some idea that a conspiracy does in fact exist. There has been no showing here that Mr. Tolopka knew that a conspiracy existed or that he wilfully participated after this transaction, and this transaction which occurred assumingly in October, which is a secondary conspiracy

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2 aspect, was before the entire conspiracy got under way..
3 Certainly he cannot be charged with those acts since his
4 participation clearly was terminated at that point.

5 THE COURT: All right.

6 MR. CURRAN: On the point that Mr. Richman
7 addressed himself to, your Honor, I believe Mr. Phillips
8 did make some reference to the cocaine data and I understand
9 he intends to submit the rest to your Honor as a judicial
10 notice item.

11 But over and above that, and I think probably
12 more properly, I believe that the defendant Tolopka testi-
13 fied on cross examination that he knew that cocaine and
14 heroin, the narcotics violations, in addition to being state
15 violations -- and he testified he made many arrests or a
16 number of arrests, at least, when he was with the 28th
17 Squad -- were violations of the federal law, and I
18 submit to your Honor on that testimony alone, without any
19 other considerations, and there are other considerations
20 in the record, that is more than enough to send the case
21 to the jury as to the defendant Tolopka.

22 MR. RICHMAN: May I respond to that, sir?
23 Whether or not Mr. Tolopka knew himself that it was a
24 federal violation, he was wrong, because it wasn't a federal
25 violation. It is not a federal violation, your Honor,

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2 unless you know it was imported or the amount involved
3 is substantially more than those standards established
4 in Turner and Gonzalez. We have not shown that this
5 is the case here.

6 THE COURT: All right. I understand.

7 Mr. Curley, I have a question for you. Are
8 you going to add anything to your papers?

9 MR. CURLEY: I have some matters that would
10 deal with the last part, about severance, but nothing to
11 the main part of it, your Honor.

12 THE COURT: All right.

13 MR. CURLEY: Some of the matters that came out
14 after I prepared these papers, the incident with Joe
15 Sharp's wife and some of the somewhat disastrous cross exami-
16 tion of the defendant who testified.

17 I take it then the court doesn't wish to
18 hear argument on what I have in my papers?

19 THE COURT: No. I will hear from the
20 government.

21 MR. CURRAN: Your Honor, as I understand the
22 testimony of Stasi, he said that after the third mixing
23 session, without a date, as I recall, he delivered
24 two half bags of heroin which he had in his apartment
25 and he brought them to the Beach Rose Club, he gave

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2 them to Gigi Inglese, and later this defendant came into
3 the kitchen and walked out with the same brown bag that
4 he had given to Gigi. That is pages 315 and 316
5 of the record, your Honor, I believe.

6 I think he also testified on direct examination
7 that after the fifth mixing session at the Blue Lounge
8 Stasi, again pursuant to the defendant Inglese's instruc-
9 tions, went to his apartment and returned to the Blue
10 Lounge with a half a kilogram bag of heroin and gave
11 it to the defendant Inglese in the kitchen, that this
12 defendant Marchese, then walked into the kitchen and walked
13 out with the brown bag under his arm, the same brown
14 bag which Stasi had given to the defendant Inglese.
15 That I believe is at pages 324 and 325 of the record.

16 I submit, your Honor, that at least prima
17 facie with respect to participation in the conspiracy and
18 the substantive counts that that constitutes more than
19 sufficient evidence to connect Marchese to the conspiracy
20 and to establish his violation at least prima facie of a
21 substantive count and that this matter should be submitted
22 to the jury.

23 I have read rather quickly the memorandum
24 and it seems to me, your Honor, that there is a suggestion
25 about when you tie different testimony together, because

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2 Barnaba never testified about Marchese. As your Honor
3 knows, there is a lot of material to argue to the jury,
4 as this memorandum of law exhibits, as to possible mixed-
5 up dates and everything else, but I submit, your Honor,
6 that prima facie the jury could find on the evidence that
7 has been presented both substantive violations and conspir-
8 acy guilt.

9 THE COURT: All right. Mr. Leighton, you
10 indicated that you didn't want to argue.

11 MR. LEIGHTON: No, sir.

12 THE COURT: Mr. Panzer?

13 MR. PANZER: No, your Honor.

14 THE COURT: All right. I am reserving on
15 all the motions, except for one thing.

16 Mr. Curley, your motion for a severance, is it
17 a motion for a severance and a mistrial? I don't under-
18 stand exactly where your motion leaves me. If, for
19 example, I grant a severance, where does it leave the case?

20 MR. CURLEY: I don't know where it leaves
21 the case, unless you want to present it in two parts to
22 the jury.

23 If there is no dismissal and there is a sever-
24 ance the case would be more or less up in the air, unless
25 there was a mistrial declared. Either there would be